# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

## No. 217.

CHARLES SWANSON, PLAINTIFF IN ERROR,

vs.

JOHN E. SEARS AND NANCY M. KETTLER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED [illegible], 1913.

(19,000)

(22,040)

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IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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*a* UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Idaho, before you, at the sitting of the October term, 1909, thereof, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Charles Swanson, plaintiff in error, and John T. Sears and Nancy M. Kettler, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Charles Swanson as by his complaint appears.

*b* We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this *day of* 28th day of January, in the year of our Lord one thousand nine hundred and ten.

Done in the city of Boise and county of Ada, with the seal of the circuit court of the United States for the district of Idaho attached.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON,
*Clerk of the Circuit Court of the United States, District of Idaho.*

Allowed by
ISAAC N. SULLIVAN,
*Chief Justice of the Supreme Court of the State of Idaho.*

*c* [Endorsed:] Original. In the Supreme Court of the United States. Charles Swanson, plaintiff in error, vs. John T. Sears and Nancy M. Tucker, defendants in error. Writ of error. Filed Jan. 29, 1910. I. W. Hart, Clerk Supreme Court of Idaho.

*d* UNITED STATES OF AMERICA,
*State of Idaho, County of Ada, ss:*

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, by virtue of the foregoing Writ of Error and in obedience thereto, do hereby certify that the following pages numbered from 1 to 384 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Charles Swanson, plaintiff in error, against John T. Sears and Nancy M. Kettler, defendants in error, including a true and correct copy of the opinion of said court herein, and of the petitions for rehearing and the order denying said petitions for rehearing.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the City of Boise, County of Ada, State of Idaho, this 15th day of February, in the year of our Lord one thousand nine hundred and ten.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk.*

1 to 4 In the Supreme Court of the State of Idaho.

No. 1596.

CHARLES SWANSON, Appellant,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Respondents.

Appeal from the District Court of the Fourth Judicial District of Idaho, in and for Blaine County.

*Transcript on Appeal.*

John M. Zane, Stockslager & Bowen, Attorneys for Appellant.
Sullivan & Sullivan, McFadden & Brodhead, Frank Reeves, Attorneys for Respondent.

Wood River Times Book and Job Print, 1909.

Filed Sept. 15, 1909.
I. W. HART, *Clerk,*
By F. J. MILLSAPS, *Deputy.*

5 In the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine.

CHARLES SWANSON, Plaintiff,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Defendants.

Adverse Suit.

*Complaint.*

The plaintiff complains and alleges:

That the said plaintiff and Robert R. Warren and Erik An-
6 derson hereinafter named, are and at all times mentioned in this complaint have been citizens of the United States.

2.

That at all times since the 3rd day of January 1889, the plaintiff by himself or his predecessors in interest to-wit: Robert R. Warren and Erik Anderson, were the owners in possession, by virtue of a discovery of mineral thereon and location thereof made on said 3rd day of January, 1889, of that certain mine and mining claim, containing a lode of rock in place bearing gold, silver, lead and other precious metals situated in Warm Springs Mining District, Blaine County, Idaho, called and known as the Independence No. 2 Lode Mining Claim and particularly described as follows:

Beginning at corner No. 1 of the said Independence No. 2 claim, which corner is N. 5 degrees, 31 minutes, 50 seconds west, 4482.8 feet from corner of Sections 23, 24, 25 and 26, Township 4, North Range 18 East, Boise Meridian; running thence from said corner No. 1 South 85 degrees, 57 minutes W. 1500 feet to corner No. 2 of said claim; thence North 16 degrees W. 570 feet to corner No. 3; thence N. 84 degrees, 8 minutes E. 1494 feet to corner No. 4, thence S. 16 degrees E. 660 feet to corner No. 1, the place of beginning, containing 19,702 acres, and being in the Section 23, Township 4 N., Range 18 E., Boise Meridian.

3.

That on the 3rd day of January, 1889, the lands embraced
7 within the above description were mineral lands of the public domain, and entirely vacant and unoccupied, and were not owned, held or claimed by any person or persons as mining ground or otherwise, and while the same were so vacant, unoccupied and unclaimed, to-wit, on the 3rd day of January, 1889, the plaintiff together with the said Robert R. Warren and Erik Anderson, entered upon and explored the said premises, and discovered and located the said Independence No. 2 lode within the same, being a lode of rock in place containing gold, silver, lead and other precious metals; and the said plaintiff, together with the said Warren and Anderson, then

and there located and occupied said lode and the said described premises as a mining claim; that the said locators at the time of making such location placed a substantial stake not less than four inches square or in diameter, at each end of the said described premises, and as near as practicable along the course or line of the vein or ledge, and also a similar stake at each corner thereof, all of said stakes being at least four feet high above the surface, and each was marked distinctly with the name of the claim, to-wit: The Independence No. 2; that said locators then and there prepared a notice of location in words and figures as set forth in Exhibit "A" to this complaint, which exhibit is hereby referred to and made a part hereof, and said notice of location was then and there conspicuously posted on a substantial post not less than four feet above the sur-
8 face and four inches in diameter at the point of discovery; that thereafter, to-wit, on January 4, 1889, said claim was recorded in the district where same was situated, to-wit, Warm Springs Mining District, by then and there filing said location notice for record with the recorder thereof, duly verified, and the same was thereafter, to-wit, on the same day, duly recorded in Book 22, Page 101, Quartz Claim Records of Alturas (now Blaine) County, and at page 237 in Book F, of quartz claim of the records of said Warm Springs Mining District; that a copy of said notice of location, with affidavit of verification as provided by law, is annexed hereto as Exhibit "A" and expressly referred to and made a part hereof.

4.

That at all times since the discovery and location aforesaid the plaintiff, or the plaintiff and his co-locators, have done and performed not less than $100.00 worth of labor and improvement in and upon said mining claim during each and every year for the development of said claim, and have duly performed each and every act required by law or the rules and regulations of said mining district in force and effect, in order to make and hold a valid location on such lode and mining claim.

5.

That the said Robert R. Warren and the said Erik Anderson on October 21, 1895, and January 8, 1900, respectively by writ-
9 ten deeds of conveyance duly executed, acknowledged and delivered, transferred, and conveyed to plaintiff all their right, title, claim or interest in and to said lode and mining claim, and at all times since plaintiff has been the sole owner (except as against the paramount title of the United States) of said lode and claim and is now in possession of said claim, working and developing same.

6.

That the defendants claiming to be the owners of alleged adjacent mining claim, called the Malta No. 1 mining claim, prior to January 10, 1908, wrongfully caused said alleged Malta No. 1 to be surveyed

as to cross and overlap the said Independence No. 2 claim and lode, and include within said Malta No. 1 a portion of the said Independence No. 2 described as follows:

Beginning at a point on the southerly side line of the Independence No. 2, U. S. Survey 2360, where the same intersects the easterly side line of the Malta No. 1, U. S. Survey 2337, which point is North 6 degrees, 32 minutes, E. 179.3 feet from corner No. 1 of said Malta No. 1 claim, and S. 85 degrees, 57 minutes W. 894.9 feet from corner No. 1 of the Independence No. 2 claim, running thence N. 6 degrees, 32 minutes E. 584.2 feet to the intersection of the northerly side line of the Independence No. 2 claim; thence along said northerly side line S. 84 degrees, 48 minutes W. 589.5 feet to the intersection of the westerly side line of said Malta No. 1 claim; thence along such westerly side line S. 8 degrees, 18 minutes W. 575.74
10 feet to corner No. 2 of said Independence No. 2 claim; thence along the southerly side line of the said Independence No. 2 claim N. 85 degrees, 57 minutes E. 605.1 feet to the place of beginning, containing 7,777 acres.

7.

That on or about January 10, 1908, the defendants filed the field notes and a diagram of said survey of the alleged Malta No. 1 claim, and also an application for a patent for said mining claim in the United States Land Office at Hailey, Idaho, and caused the Register of said Land Office to give notice of said application for patent, by publication, as required by law, and the first publication of same was made January 10, 1908.

8.

That in and by said application for patent the defendants wrongfully set up and alleged that they were the owners and in possession of the whole of said Malta No. 1 claim inclusive of the premises last above described, and the lode therein, part of the Independence No. 2 claim and the property and in possession of the plaintiff.

9.

That plaintiff on or about February 29, 1908, and during the sixty days' period of publication of notice of application for patent for said alleged Malta No. 1 claim, filed in said Land Office under oath by Harry J. Allen, his duly authorized and empowered attorney
11 in fact, a protest and adverse claim to said application and for last described premises and the lode therein in due form, and showing the nature, extent, and boundaries of the adverse claim of the plaintiff as hereinbefore described, and thereupon proceedings on said application, in said Land Office, were and are stayed to await the determination, by a court of competent jurisdiction, of the right of possession to the last named described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit; the period of 30 days not having elapsed since the filing of said protest and adverse claim.

10.

That the defendant maintains and prosecutes said application for patent for the alleged Malta No. 1 claim, and thereby the title and possession of plaintiff in and to the last above described premises being the area thus brought in conflict between the Independence No. 2 claim and the Malta No. 1 claim are wrongfully impeached, clouded and incumbered, and the value of the plaintiff's estate and property therein greatly depreciated.

11.

And the plaintiff further says that the Independence No. 2 claim was and is a prior location and claim to the alleged Malta No. 1 claim.

Wherefore, the plaintiff prays judgment and relief as follows:

That the plaintiff is now owner and lawfully entitled to
12 the possession of the last above described premises, the area in conflict between the Independence No. 2 and the Malta No. 1 and also the lode and vein therein; and quieting and confirming plaintiff's title thereto and possession thereof.

That the defendant has no title to or right of possession of said conflict; area or the lode or vein therein, or any part thereof.

That the defendant be restrained pending the action and upon trial perpetually, from entering in or on said conflict area or lode therein, or any part thereof; or mining in, or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof. Also that plaintiff have all other and proper relief with costs of suit.

STOCKSLAGER & BOWEN,
*Attorneys for Plaintiff, P. O. Address, Hailey, Idaho.*

[Duly verified.]

EXHIBIT "A."

*Location Notice.*

Notice is hereby given, that we the undersigned citizens of the United States of America, conforming to the mining laws thereof and of the territory of Idaho, and the local rules, regulations and customs of miners, have the 3rd day of January, 1889, located and
do claim 1500 linear feet on this lead lode or vein bearing
13 mineral in place, by 600 feet in width the same being 300 feet on each side of the center thereof; together with all dips and spurs, and angles and all other veins or lodes, the top or apex of which lies within said boundaries.

This location is named Independence No. 2 lode or mine, and is situated and joining on the east end on the Independence mine, and is on the divide between the Independence and the Courier gulches in Warm Springs Mining District, Alturas County, Idaho Territory, and as bounded and described as follows:

Commencing at this notice and running thence one hundred feet in a westerly direction on said lode and fourteen hundred feet in an easterly direction therefrom.

Located this 3rd day of January, 1889.

(Signed) ERIK ANDERSON.
CHAS. SWANSON.
R. R. WARREN.

TERRITORY OF IDAHO,
*County of Alturas, ss:*

I, Robert R. Warren, do solemnly swear that I am one of the within named locators and claimants and am acquainted with the ground described in this notice of location called Independence No. 2 lode or mine, and that the ground or claim herein described, or any part thereof has not, to the best of my knowledge and
14 belief, been heretofore located according to the laws of the United States and of this territory; or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply, in respect thereto, with the requirements of said laws.

(Signed) R. R. WARREN.

Subscribed and sworn to before me this 4th day of January, 1889.

JOHN M. CANNADY,
*County Recorder,*
By G. METZLER, *Deputy.*

Filed for record at the request of Robert R. Warren, January 4th, 1889, at 3:40 o'clock P. M. and is duly recorded in Book 22, Page 101, Quartz Claim Records of Alturas County and in Book F of Quartz Claims, Page 237 of the records of Warm Springs Mining District.

JOHN M. CANNADY,
*County Recorder,*
By G. METZLER, *Deputy.*

Complaint filed March 13, 1908.

15 *Answer and Cross-Complaint.*

Comes now the above named defendant, Nancy M. Kettler, and for answer to the complaint on file herein, admits, denies and avers:

For a first defense:

1.

That as to whether or not said plaintiff or Robert R. Warren or Erik Anderson are or have been, at any time mentioned in the complaint herein, citizens of the United States, this defendant has no

information or belief upon the subject sufficient to enable her to answer, and, therefore, denies the same.

2.

Denies that at all times since the 3rd day of January, 1889, or at any time, the plaintiff or his predecessors in interest, or either of them, was or were the owner or owners in possession or otherwise, by virtue of a discovery of mineral thereon, or location thereof, made on said 3rd day of Janu[illegible], 1889, or by virtue of any act or thing whatever, of that certain mine or mining claim alleged to contain a lode of rock in place bearing gold, silver, lead and other precious metals, situated in Warm Springs Mining District, Blaine County, Idaho, called or known as the Independence No. 2 lode mining claim and particularly described in paragraph 2, of plaintiff's complaint.

16

3.

Denies that on the 3rd day of January, 1889, the lands described in said paragraph 2, were entirely vacant or unoccupied or were not owned or held or claimed by any person or persons as mining ground or otherwise; and denies that on the said 3rd day of January, 1889, or at any time while the same were vacant or unoccupied or unclaimed the plaintiff, together with one Robert R. Warren, or either of them, entered upon or explored the premises or occupied or discovered or located the said Independence No. 2 lode within said premises; and denies that said locators, or either of them, at the time of making said alleged discovery, or at any time, erected a substantial monument not less than four feet high at such place of discovery; or that upon which they, or either of them, placed their names, or the name of the said claim, or the date of such discovery or the distance along the vein each way from such monument; and denies that said locators, or either of them, within ten days thereafter, marked the boundaries of such claim by establishing at each corner or angle a monument more than four feet high or such as would readily give notice, or marked with the name of the claim or the corner or angle that it represented, or at all, or also posted at such discovery monument their notice of location such as the copy filed for record as alleged in paragraph 3 of the complaint herein; and this defendant alleges the fact to be, that if there ever was, at any time, an attempted or pretended location made by said

17 plaintiff and said Warren, or either of them, with the design to take and hold for mining purposes, any lands upon the public domain of the United States, under the name of Independence No. 2 lode mining claim, that such lands and public domain were entirely different from the lands now claimed by the plaintiff to be included within the pretended location boundaries of said claim.

4.

Denies that since the pretended location aforesaid, the plaintiff, or *the plaintiff or* his co-locators, have done or performed not less

than $100.00 worth of labor or improvements in or upon said mining claim, during each or every year, or any year, for the development of said claim or have duly performed each or every act required by law to hold said claim or make the same a valid location.

5.

That as to whether or not Robert R. Warren or Erik Anderson, at any time, respectively conveyed to plaintiff all of their interests in or to said pretended mining claim, this defendant has no information or belief upon the subject sufficient to enable her to answer and, therefore, denies the same; and further denies that at all times since the plaintiff has been the owner of said pretended claim or is now in possession of, or working or developing the same.

6.

18 Denies that the defendants, or either of them, claiming to be the owner or owners of the Malta No. 1 mining claim, prior to January 10th, 1908, wrongfully caused said alleged Malta No. 1 to be surveyed as to cross or overlap the said pretended Independence No. 2 claim or to include within said Malta No. 1, a portion of said Independence No. 2 as described in paragraph 6 of the complaint herein; but alleges the fact to be that the said defendants caused said survey to be made upon the ground in accordance with the markings, locations and descriptions of said claim as they existed upon the ground and appeared of record, and that there is no interference or conflict between plaintiff's alleged and pretended claim and this defendant's said lode claim whatever.

7.

Denies that in or by said application for patent, the defendants wrongfully set up or alleged that they were the owners or in the possession of the whole of said Malta No. 1 claim, inclusive of the premises described in paragraph 6 of the complaint, or the lode therein, part of the Independence No. 2 claim or property in the possession of the plaintiff; but avers the facts to be that her claim to the whole of said Malta No. 1 claim is lawful and valid, and that the same is no part of the pretended Independence No. 2 mining claim, and that the area described in said paragraph 6, alleging and describing the conflict between the said mining claim of defendant on the one hand and the pretended mining claim of plaintiff
19 on the other, is not the property of, or in the possession of said plaintiff, but on the contrary this defendant states the fact to be, that said Malta No. 1 mining claim, including the alleged conflict therein, is the property of this defendant; and that the plaintiff has no estate, right, title or interest in or to the same nor any part thereof.

8.

Admits that plaintiff did, as set forth in paragraph 9 of the complaint, file what is pretended to be a protest and adverse claim to

said application or a patent, but denies that the same is in due form or shows the nature or extent or boundaries of said adverse claim of plaintiff or that it describes at all the area in conflict existing in fact upon the ground as either of said claims are marked thereon or described of record, or as any of said boundaries appear thereon; and this defendant further answering alleges that the said pretended protest and adverse claim, describes no premises in conflict between the plaintiff's alleged claim and the claim belonging to this defendant based upon any valid location of any mining lode claimed, or pretended to be claimed, or owned by the plaintiff, or claimed or pretended to have been located by the plaintiff or any of his grantors or predecessors in interest in compliance with the laws of the United States and the State of Idaho.

9.

20 Denies that any mining claim of plaintiff, or any valid title or possession which he may have to any mining claim, is wrongfully impeached, or clouded or incumbered by said application for patent, or that the plaintiff's estate or property in any valid mining claim is depreciated in value at all.

10.

Denies that the Independence No. 2 claim was or is a valid prior location or claim to the Malta No. 1 mining claim.

For a further and second defense, this defendant alleges:

1.

That said plaintiff ought not to be permitted to say or to attempt to prove that any portion whatever of said Malta No. 1 claim is in conflict with said Independence No. 2 claim, for the reason that on or about the 1st day of January, 1904, when said Malta No. 1 mining claim was located by the predecessor of this defendant, the said plaintiff was present on the ground and pointed out to this defendant and to her said predecessor, and others, the old discovery of that certain mining claim known as the Emma No. 2 mining claim, situated in Warm Springs Mining District, Blaine County, Idaho, and where the boundary lines of the same ran and at the same time showed and pointed out to this defendant and her said predecessor the boundary lines of the Independence No. 2, and
21 stated that the same in no way covered any of the land embraced in the old Emma No. 2 claim.

2.

That this defendant and her said predecessor at said time informed said plaintiff that her said predecessor intended to relocate the same land as was embraced in said Emma No. 2 mining claim and have the same boundary lines; that said plaintiff thereupon assisted her said predecessor and herself in determining where the former boundary lines were so that they would be the same in the location of the Malta No. 1 mining claim; that there were no monuments or stakes

of the Independence No. 2 on said land; that there was nothing to show that anyone had relocated in whole or in part any of the land embraced in the old Emma No. 2 claim; that at that time said plaintiff did not make any claim to any portion of said ground, but encouraged the relocation thereof.

3.

That at all times mentioned herein said plaintiff was apprised of the true state of his own title in and to the land embraced in said mining claim; that said declarations and conduct of said plaintiff deceived this defendant and her said predecessors and were such careless and culpable negligence on the part of said plaintiff as to amount to fraud upon this defendant, and her said predecessor; that this defendant and her said predecessor were not only
22 destitute of all means of the true state of the title to said land but of all convenient and available means of acquiring such knowledge; that the actions, declarations and conduct of said plaintiff with reference to his title or claim thereto were such as to deceive and mislead this defendant and her said predecessor and to deter, prevent and dissuade them from examining the records and learning the true boundary lines of said Independence No. 2 claim and the title thereto; that this defendant, and her said predecessor fully relied upon said admissions and declarations of said plaintiff and will be injured in this action by allowing their truth to be disproved.

4.

That this defendant and her said predecessor were thereby induced by said plaintiff to believe and did believe that all of the land embraced in the old Emma No. 2 claim was open to relocation and that no portion of the same was included in or a part of the Independence No. 2 claim, and acting upon said belief, her said predecessor located the Malta No. 1 mining claim; as aforesaid and included in and covered the same ground as formerly embraced in the said Emma No. 2 mining claim, and did all things hereinafter alleged in making said location a valid and subsisting mining claim location under the laws of the United States and of the State of Idaho; and further said plaintiff then knowingly stood by and looked on and suffered this defendant and her predecessors in
23 interest to expend large sums of money in the development of said mining claim and make improvements thereon, under the opinion that this defendant and her said predecessor could secure a good title thereto from the United States on the suggestion that the title was still in the United States, without making known his claim or ownership therein or apprizing this defendant or her predecessors of the true title therein; and did thereby create a belief in the mind of this defendant and her said predecessors that he claimed no part of the same, but that title was in the United States.

And for further answer this defendant, by way of cross-complaint against the plaintiff, alleges:

1.

That during all times mentioned herein, prior to the 21st day of November, 1906, the name of this defendant was Nancy M. Tucker, she having on said date intermarried with Louis Kettler; and during all times mentioned herein she was and now is a citizen of the United States.

2.

That on the first day of January, 1904, this defendant's predecessor in interest, a citizen of the United States, was and this defendant and her grantor ever since have been the owners and this defendant is now the owner (subject to the paramount title of the
24 United States) and in the possession and entitled to the possession by virtue of the discovery of the mineral thereon and location thereof made on the 1st day of January, 1904, of that certain mine and mining claim containing a lode of rock in place bearing gold, silver, lead and other precious metals, situated in Warm Springs Mining District, County of Blaine and State of Idaho, called the "Malta No. 1" lode mining claim, and more particularly described as follows:

Commencing at corner No. 1 from which the corner to sections 23, 24, 25 and 26, T. 4 N. R. 18 E., bears 17 degrees, 40 seconds, 35 minutes E. 4429.9 ft., thence N. 6 degrees, 32 minutes E. 1442.6 ft. to corner No. 2; thence N. 87 degrees, 5 minutes W. 300 ft. to intersection of lode line, from which intersection discovery bears S. 6 degrees, 32 minutes E. 50 ft.; thence N. 87 degrees, 5 minutes W. 255.3 ft. to corner No. 3; thence S. 8 degrees, 18 minutes W. 1446.1 ft. to corner No. 4; thence S. 87 degrees, 5 minutes E. 600 ft. to corner No. 1, the place of beginning survey of exterior boundary of said lode claim. Magnetic variation at 19 degrees E. The said claim being located in the S. W. ¼, S. E. ¼ Sec. 14, and N. W. ¼, N. E. ¼ Sec. 23, T. 4, N. R. 18 E., containing an area of 18,881 acres.

3.

That on the 1st day of January, 1904, the premises hereinbefore described as the "Malta No. 1" lode, vein and mining claim,
25 situated in said Warm Springs Mining District, was vacant, unoccupied and unclaimed mineral land of the United States and subject to location under the mining laws thereof; and that on said day the said locator, being a citizen of the United States over the age of 21 years, entered upon and explored said premises, found therein rock in place bearing gold, silver and other precious metals, and thereupon, or about said day, located and appropriated, for a mining claim for said mineral 1500 lineal feet of and along said vein or lode of mineral and surface ground embracing said vein, lode and mineral, and 600 feet in width, for the length aforesaid, 300 feet on each side of said mineral vein or lode; that said locator on the day the claim was located and discovered erected a substantial monument at the discovery on said ledge or vein of mineral, gold, silver and other ores, upon which he placed his name, the name of

the claim, the date of discovery and the distance claimed along the vein each way from such monument and, within ten days thereafter, marked the boundaries of said claim distinctly by monuments, at each corner thereof, with the name of the claim and the corner it represented so that its boundaries could be thereby easily traced, said monuments being at least four feet high above the ground and four inches in diameter, each being marked upon the side facing towards the discovery; and at the same time posted in a conspicuous place on the discovery monument a written notice of said location containing the name of the locator, the name of the claim,
26 the date of discovery and a full description of said mining claim located by reference to natural objects and permanent monuments fully identifying the claim; that within sixty days of said location said locator excavated and did the work required by law and within ninety days after the location of said claim, and subsequent to the excavation as herein alleged, to-wit: on the 4th day of February, 1904, filed in the office of the County Recorder of said mining district a substantial copy of said notice together with the proper affidavit duly made and subscribed by said locator.

4.

That at all times since the discovery and location aforesaid, this defendant, or this defendant and her predecessors, have done and performed not less than $100.00 worth of labor and improvement in and upon said mining claim during each and every year for the development of said claim, and have duly performed each and every act required by law or the rules and regulations of said mining district in force and effect, in order to make and hold a valid location on such lode and mining claim.

5.

That on the 2nd day of March, 1908, defendant, John T. Sears, conveyed to this defendant by a good and sufficient deed of conveyance, all his right, title and interest in and to said "Malta No. 1" mining claim.

27

6.

That said plaintiff claims some estate or interest in and to said mining claim, or some part thereof.

7.

That the claim of said plaintiff to the alleged conflict area between the mining claim of this defendant and the pretended mining claim location of said plaintiff and any other claim of title or possession by said plaintiff in or to said "Malta No. 1" mining claim is without any right whatever and said plaintiff has no estate, right, title or interest whatever in said mining claim or any part thereof.

Wherefore, defendant prays judgment of this Court:

First. That the plaintiff's complaint be dismissed.

Second. That the title of this defendant in and to said "Malta No. 1" mining claim be quieted in said defendant, and that she be decreed to be the owner, and in possession, and entitled to the possession of the whole of said "Malta No. 1" mining claim as against said plaintiff and all other persons.

Third. That said plaintiff be restrained pending the action and during the trial hereof from entering in or upon said al-
28 leged conflict area or lode therein, or any part thereof, or mining in or extracting any ores or minerals therefrom, and from in any way interfering with defendant's possession thereof; and that upon the final determination of this action, said restraining order be made perpetual.

Fourth. And for such other and further relief as may be just and equitable, and for her costs of suit.

McFADDEN & BRODHEAD,
SULLIVAN & SULLIVAN,
*Attorneys for Defendant.*
*Residence: Hailey, Idaho.*

[Duly verified.]

Answer filed April 29, 1908.

*Disclaimer.*

Defendant, John T. Sears, files a disclaimer.

*Answer to Cross-Complaint.*

Comes now the plaintiff in the above entitled action and answering the cross complaint of the defendant, Nancy M. Kettler, admits, denies and alleges as follows:

1.

29 Not having sufficient information or belief to enable the plaintiff to answer to allegations of paragraph one of said cross-complaint, therefore the plaintiff denies that during all times mentioned therein or at any other time or at all the said defendant, Nancy M. Kettler, was or is a citizen of the United States.

2.

Not having sufficient information or belief to enable plaintiff to answer the allegations of the second paragraph of the cross-complaint with reference to the citizenship of the defendant's predecessor in interest, therefore plaintiff denies that said predecessor is or was a citizen of the United States; and denies that said defendant or her grantor was January 1, 1904, or at any time since have been the owners or in possession or entitled to possession by virtue of discovery of mineral thereon or location thereof or otherwise or at all of that certain mine or mining claim called the Malta No. 1 and described in the cross-complaint.

3.

Denies that on the 1st day of January, 1904, or at any other time since the 3rd day of January, 1889, the premises described in the cross-complaint as the Malta No. 1 lode was or is vacant, unoccupied or unclaimed mineral land of the United States or subject to location under the mining laws thereof; and denies that on the 1st day of January, 1904, the locators of said claim entered
30 upon or explored said premises, or found rock therein in place containing gold, silver or other precious metals; and deny that on said day or at any other time said locators located or appropriated for a mining claim or otherwise 1500 linear feet or any other feet along said vein or lode or the surface ground embracing said vien or lode or mineral, or located 600 feet in width for the length stated 300 feet on each side of said mineral vein or any other amount; and denies that said locator on said day or at any other time erected a substantial or other monument at the place of discovery or that he placed his name or the name of the claim or the date of discovery or the distance claimed along the vein each way or that within ten days thereafter or at any other time marked the boundaries of said claim distinctly or otherwise by monuments at the corner thereof or otherwise or at all with the name of the claim or the corner it represented so that its boundaries could be easily traced or otherwise or at all; and denies that said monuments were at least four feet above ground or four inches in diameter or that each was marked upon the side facing said discovery; and denies that he at the same time or at any time posted in a conspicuous place or other place on the discovery monument or anywhere else a written notice of said location containing the name of the locator or the name of the claim or the date of discovery or a full description of said claim located by reference to natural objects or permanent monuments identifying the claim or otherwise or
31 at all; and denies that within sixty days after said location or within any other time said locator excavated or did the work required by law or within ninety days after said location or at any other time filed in the office of the County Recorder of said mining district a copy of said notice together with the proper affidavit duly made or subscribed by said locator. The said denials are made upon lack of information or belief sufficient to enable the plaintiff to answer the allegations of the defendants in those respects.

4.

Denies that at all times since the discovery or location alleged in the cross-complaint or at any other time the defendant or her predecessor have done or performed not less than $100.00 worth of labor or improvements in or upon said claim during each or any year for the development of said claim or any other purpose or at all; and denies that said defendant or her predecessors have duly performed each or any of the acts required by law or the rules and regulations of said mining district in force or effect. The denials above stated

are made because of lack of information or belief sufficient to enable the plaintiff to answer defendant's allegations in such respect.

5.

Not having sufficient information or belief to enable the plaintiff to answer the allegation of paragraph five of the cross-com-
32 plaint, the plaintiff therefore denies that the defendant, John T. Sears, has conveyed to the defendant, Nancy M. Kettler, all or any of his right, title or interest in or to said Malta No. 1 claim.

6.

Admits that the plaintiff claims an estate and interest in and to a portion of the premises described in defendant's cross-complaint and alleges that said claim arises by virtue of prior discovery and location, all of which together with the part or portion of said premises claimed by plaintiff fully appears by the allegation of plaintiff's complaint on file herein, which complaint plaintiff hereby reiterates and adopts as a part of this his answer to defendant's cross-complaint.

7.

Denies that the claim of this plaintiff to the conflict therein between the Independence No. 2 and the said alleged Malta No. 1 claim is without right and denies that plaintiff has no right or estate, title or interest in said Malta No. 1 claim; but alleges that plaintiff is the owner in the possession and entitled to possession of all that part or portion of the premises described in the defendant's cross-complaint and embraced within the conflicting area as set forth in plaintiff's complaint to which reference is hereby made.

Wherefore, the plaintiff prays that the defendant take
33 nothing by her cross-complaint and that the same be dismissed and that the right and title of plaintiff in and to said Independence No. 2 claim, including all area in conflict with the premises described in the cross-complaint as the Malta No. 1 claim, be quieted, and that plaintiff be given his costs.

STOCKSLAGER & BOWEN,
*Attorneys for Plaintiff.*
*Residence: Hailey, Idaho.*

[Duly verified.]

Answer to cross-complaint filed October 10, 1908.

*Findings and Conclusions.*

This cause came on regularly for trial on the 2nd day of December, 1908, before the Court without a jury, a jury having been expressly waived in open Court by the respective parties:—Messrs. Stockslager & Bowen appearing as counsel for plaintiff, and Frank Reeves, McFadden & Brodhead and Sullivan & Sullivan appearing

as attorneys for the defendant. And the Court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the Court for its decision the Court now finds the following facts:

34 1. That during all times mentioned herein prior to the 21st day of November, 1906, the name of the defendant, Nancy M. Kettler, was Nancy M. Tucker, she having on said date intermarried with Lewis Kettler.

2. That defendant, Nancy M. Kettler, was during all times mentioned herein, and now is, a citizen of the United States of America, native born.

3. That on the 21st day of May, 1881, John Sears and S. M. Tucker, both native born citizens of the United States, entered upon a certain portion of the public domain of the United States while the same was vacant, unoccupied and unclaimed mineral land of the United States, subject to the location under the mining laws thereto, and found therein rock in place bearing silver and other precious metals, and thereupon, duly located and appropriated for the mining claim the Emma No. 2 lode mining claim situated in Warm Springs Creek Mining District, Alturas County, (now Blaine), Idaho, including 1500 feet of and along the vein thereon and 300 feet on each side thereof; that the said locators at the time of making said location placed a substantial post, not less than 4 inches square in diameter, at each end of the ground claimed along the course of the vein or ledge, and also a similar post at each corner of the location; that the posts so placed were at least 4 feet high above the surface, and were each and every one marked dis-

35 tinctly with the name of the claim; that said locators on date said claim was located made their discovery of a vein or lode of rock in place bearing silver and other precious metals within the surface boundaries of said claim, and thereupon erected a substantial monument at said discovery of said vein of mineral, and at the same time conspicuously posted at the point of the discovery of said claim, to-wit: at a place on the discovery monument so as to be readily seen, a written notice of said location, containing date of the location, the names of the locators, the name of the claim, the quantity in feet claimed along the ledge, the width claimed from the middle of the vein, and a full description of the location of the said claim by reference to natural landmarks and fixed objects as to render the situation of the same reasonably certain from the letter of the notice itself; that within 15 days from the time of the posting of said notice, said locators caused to be filed in the office of the County Recorder of said mining district, a substantial copy of said notice, together with an affidavit duly made and subscribed by one of said locators, substantially in form as prescribed and provided for under the laws of the Territory of Idaho, and performed each and every of the matters required to be done under the laws of the United States and the Territory of Idaho, to initiate and constitute a valid and subsisting mining claim location.

4. That prior to the year 1902, defendant, Nancy M. Ket-
36 tler, then Nancy M. Tucker, acquired a certain interest, by good and sufficient conveyance, of, in and to said Emma No. 2 mining claim, and retained said interest therein until a relocation of said Emma No. 2 was made in her behalf under the name of the Malta No. 1 as hereinafter found.

5. That at all times since the discovery and location aforesaid, defendant, Nancy M. Kettler, and her predecessors in interest have done and performed not less than $100.00 worth of labor and improvements, which tended to develop said mining claim as provided by law, during each and every year down to and including the year 1902.

6. That between the 2nd day of December and the 25th day of December, 1888, Samuel Tucker and John Smith, in behalf of the owners of the Emma No. 2 mining claim, performed more than $100.00 worth of labor and improvements upon said mining claim for the developent of said claim, and the work so performed did actually and beneficially develop said mining claim to some extent.

7. That Robert R. Warren, during all times mentioned in the complaint herein, was a native born citizen of the United States, and Erik Anderson, during said time, was a naturalized citizen of the United States; the plaintiff, Charles Swanson, during said time, was not, nor is he now, a citizen of the United States, but on
37 March 31st, 1873, he filed in the Circuit Court of the United States for the District of Nebraska, his declaration of intention to become a citizen of the United States.

8. That on the 3rd day of January, 1889, the Independence was a mining claim adjoining the Emma No. 2 mining claim; that at that time said Warren, Anderson and Swanson, each had an interest therein; that said east end line of said Independence joined and was flush with the west side line of the Emma No. 2; that said Independence mining claim was a short claim, less than 1500 feet in length, and joined the Ida Harland mining claim on the east.

9. That on the 3rd day of January, 1889, said Warren, Anderson and Swanson attempted to make a location of what is called the Independence No. 2 mining claim, and after finding mineral bearing rock in place, they entered upon and attempted to locate said mining claim, and thereupon, at that time, placed certain substantial posts, not less than 4 inches in diameter, and at least 4 feet high above the surface, at each end of the premises attempted to be located and also at each corner thereof, marking with the name of the claim, and did at the same time, post a notice of location, as required by law, in a conspicuous place on the monument at the point of discovery, and thereafter, on January 4, 1889, said claim was duly recorded in the Recorder's office of Alturas (now
38 Blaine) County, with the proper affidavit attached to said notice of location; that said attempted location pretended to join the Independence mining claim on the east; that the ground staked under said attempted location included a strip in excess of 1500 feet in length; that the NE corner stake of said attempted location was at a distance of about 2000 feet from the NW corner,

and the SE corner stake was at a distance of about 1800 feet from the SW corner of said attempted location; that said NE and SE end stakes were placed over a ridge that ran across the eastern end of the claim; that the land embraced in said attempted location included a strip of land 600 feet X 600 feet (of the Emma No. 2 mining claim), said area being 600 feet directly east of the east end line of the Independence mining claim, which would be the west 600 feet of said attempted location of Independence No. 2; that the discovery of said attempted location of Independence No. 2 was on ground embraced and included in ground covered by the said Emma No. 2 mining claim, (a valid and subsisting mining claim at that time) on that portion which was immediately east of said Independence mining claim; that the discovery of said attempted location was at a point marked "Disc Cut" on plaintiff's exhibit B, a few feet east of the west side line of the Malta No. 1 mining claim, which at the time of said attempted location was Emma No. 2; that after making the discovery and posting the notice as aforesaid of the Independence No. 2 location, said locators
39 attempted to re-establish the east end line of the Independence to conform to the notice of location of said Independence so the same would be a distance of 100 feet east from the discovery of the said Independence mining claim, and thereupon did move or place the east end stakes of said Independence mining claim at a distance so as to make the east end line of said Independence mining claim a distance of about 64 feet from its discovery.

10. That subsequent to said 3rd day of January, 1889, up to the commencement of this action, said locators thereof, nor anyone in their behalf did not take or have any open possession of the premises alleged to be in conflict, or any portion thereof, attempted to be located as a portion of Independence No. 2; nor did the owners of the said Emma No. 2 mining claim have any notice or knowledge of any nature or description that said Swanson, Warren and Anderson claimed the mining claim location, or any part thereof of said premises; that during all times since the attempted location of Independence No. 2 mining claim, up to 1904, said defendant, Nancy M. Kettler, and her predecessors, were in possession of said Emma No. 2 mining claim, in good faith and in the belief that they had a valid and subsisting mining location upon said Emma No. 2 mining claim, and did expend large sums of money in the development thereof; and neither did said plaintiff, nor did Anderson or Warren in any way inform or give the owners of said Emma No. 2 mining claim any notice that they claimed any interest in
40 or to said premises, or any portion thereof; and this, notwithstanding the fact, that said Swanson had full knowledge that Nancy M. Kettler and her predecessors were making said developments and expending large sums of money therein; that at this time the owners of the said Emma No. 2 had no knowledge that Swanson or his predecessors claimed any interest, or portion thereof of said Emma No. 2.

11. That plaintiff and his predecessors in interest have never performed any annual assessment work actually on the Independence

No. 2 (unless tunnels from Independence penetrated it), but from 1889 they each and every year thereafter, including 1908, performed labor of the value of at least $100.00 on said claim, by working in tunnels on the Independence claim, and such work so performed would tend to develop the Independence No. 2.

12. That the said Robert R. Warren and the said Erik Anderson on October 21, 1895, and January 8, 1900, respectively by written deeds of conveyance duly executed, acknowledged, delivered, transferred and conveyed to plaintiff, all their right, title, claim or interest in and to said purported Independence No. 2 lode mining claim.

13. That the plaintiff nor his predecessors in interest, did not file at any time since the alleged location of the Independence No. 2 mining claim, any additional or amended certificate of location thereof.

41 14. That John Sears, one of the locators of the Emma No. 2 mining claim, is the same person as John T. Sears.

15. That during the year 1903, defendant, Nancy M. Kettler, was called to Seattle on account of the illness of her daughter, who was compelled to undergo an operation there, and was not able to return to Blaine County until the latter part of December; that by reason of her being absent during this period no annual assessment was done on said Emma No. 2 mining claim; but at that time or any and all times, it was not her intention to abandon or forfeit said claim, but her intention was to do such things as she deemed proper and which she was able to do to hold said claim.

16. That defendant, Nancy M. Kettler, believed the only way she could hold the ground embraced in the old Emma No. 2 mining claim, after failing to do the assessment work for the year 1903, was to have the same re-located.

17. That acting on said belief, and with the express intention of preserving and maintaining her rights in and to the ground covered by Emma No. 2 location, she did on the 31st day of December, 1903, procure A. J. Sullivan to act for her in this behalf, and did go with him on said date, in company with William Sullivan, an adult son of A. J. Sullivan, to the house and home of plaintiff Swanson and wife, in the immediate vicinity of Emma No. 2, for

42 the purpose of having the said Emma No. 2 re-located for her on the following day; that for many years prior to said date plaintiff and his family were close friends of defendant and her family, and on said date, and at all times in these findings mentioned, prior to the year 1906, defendant placed implicit confidence in and reliance upon plaintiff.

18. That on said 31st day of December, 1903, plaintiff met defendant and her said companions, A. J. Sullivan and William Sullivan, at his said home and before they had yet reached plaintiff's said house inquired of her what brought her there at such a time; defendant then informed him that she had come to protect the Emma claims and that she was going to have them re-located, whereupon he assured her that this was unnecessary, for he, plaintiff, would not let anyone jump her claims.

19. That during the evening of December 31st, 1903, plaintiff discussed with defendant and A. J. Sullivan, the question of relocation of the Emma claims, but during said discussion, nor at any time prior to 1906 did plaintiff, either directly or indirectly inform her, either of said Sullivans or any one acting for her — behalf, that he, plaintiff, claimed any portion of the ground included in said Emma No. 2 claim.

20. That in pursuance to the discussion as to the lines and relocation of the Emmas between plaintiff and defendant, Nancy M. Kettler, and A. J. and William Sullivan, said Swanson went
43 with the said Sullivans to show them the corners and lines of said Emma No. 2.

21. That during the morning of January —, 1904, plaintiff's wife in the presence of plaintiff suggested to defendant, Nancy M. Kettler, that the names of said claims be changed from Emma to Malta, assigning as a reason therefor that it would be lucky, and defendant adopted the suggestion.

22. That plaintiff on the morning of January 1st, 1904, dictated the notice of location of Malta No. 1 (and all the other three Maltas as well) and that A. J. Sullivan reduced said notice to writing as dictated, which said notice was thereafter on said day duly posted by William Sullivan assisted by plaintiff.

23. That plaintiff went with the said Sullivans to the N. W., S. E. and S. W. corners of said Emma No. 2 and pointed out to them stakes that were then standing in the ground and informed them that they were the said corner stakes, respectively of said Emma No. 2, whereupon said stakes were adopted as said corner stakes of said Malta No. 1, being at the time in the presence of the plaintiff properly remarked as such, said stakes being very near and approximately in the same place as the corresponding official stakes of said Malta No. 1, as shown on plaintiff's exhibit B.

24. That on the day said Malta No. 1 was located there were no monuments or stakes of the Independence No. 2 on said
44 land and there was nothing to show that anyone had relocated any part of the lands embraced in the old Emma No. 2 claims.

25. That at no time mentioned in these findings, or at all, has plaintiff or his predecessors in interest had possession of any portion of the surface ground of Emma No. 2 (Malta No. 1) nor performed any assessment work on any portion of the surface thereof, nor in any tunnel or shaft which starts on any portion of the surface thereof; nor has he nor have they done or caused anything to be done on or from any portion of the surface thereof which would tend to indicate a claim on their part to any portion of said claim.

26. That the only assessment work ever done on the purported Independence No. 2 was through tunnels on the Independence claim.

27. That plaintiff's concealment from defendant of his claim to a portion of the Emma No. 2 ground and his assistance in the relocation thereof, deceived the defendant and induced her to believe that at that time, January 1, 1904, the plaintiff laid no claim to

any portion of said Emma No. 2 (now Malta No. 1), and also induced her to expend considerable sums of money thereon, thereafter.

28. That at the time of the re-location of the Emma No. 2 as Malta No. 1 plaintiff was fully apprized of whatever claim
45 he had to any portion of the ground covered by the location of said Emma No. 2 and knew the lines and corners of the Emma No. 2 and also the lines and corners of the purported location of the Independence No. 2, but did not disclose his claim to a portion of the said Emma No. 2 ground, nor advise defendant, or any one acting for her, concerning the purported location of Independence No. 2, because he desired to deceive her with reference to these matters.

29. That on the 1st day of January, 1904, A. J. Sullivan, being then a native born citizen of the United States, over 21 years of age, for her and on behalf of Nancy M. Kettler, she being then a native born citizen of the United States, over the age of 21 years, did, under and by virtue of the laws of the United States and the State of Idaho, and in conformity therewith, go upon the ground then staked and located as Emma No. 2, and re-locate and stake said ground into a new claim, naming said claim Malta No. 1; the ground embraced in Emma No. 2 and Malta No. 1 being practically identical. Said ground is situated in Warm Springs Creek Mining District, County of Blaine, State of Idaho, and is particularly bounded and described as follows, to-wit:

Commencing at corner No. 1 from which the corner to sections 23, 24, 25 and 26, T. 4 N., R. 18 E., bears 17 degrees, 40 minutes, 35 seconds E. 4429.9 ft.; thence north 6 degrees 32 minutes E.
46 1442.6 ft. to corner No. 2; thence N. 87 degrees, 5 minutes W. 300 ft. to intersection of lode line from which intersection discovery bears S. 6 degrees, 32 minutes E. 50 ft.; thence N. 87 degrees, 5 minutes W. 255.3 ft. to corner N. 3; thence S. 8 degrees, 18 minutes W. 1446.1 ft. to corner No. 4; thence S. 87 degrees, 5 minutes E. 600 ft. to corner No. 1, the place of beginning survey of exterior boundary of said lode claim. Magnetic variation at 19 degrees E. The said claim being located in the southwest quarter S. E. ¼ Sec. 14, and N. W. ¼, N. E. ¼ Sec. 23, T. 4 N., R. 18 E., containing an area of 18.881 acres.

30. That on said date said ground was vacant and unoccupied mineral land of the United States, unstaked and unclaimed by any person, except in these findings otherwise noted.

31. That upon said 1st day of January, 1904, said A. J. Sullivan, as aforesaid entered upon that portion of the public domain of the United States, including within the surface boundary of the said Malta No. 1 lode mining claim as above described and made a location thereof of said mining claim, by making upon and within the surface boundary of said claim a discovery of the vein or lode of rock in place bearing silver and other precious metals; said claim including 1500 feet of and along the vein thereon and 300 feet on each side thereof; that re-locator on the day the claim was
47 located and discovered, erected a substantial monument at the discovery of said ledge or vein of mineral, upon which

he placed his name, the name of the claim, the date of discovery and the distance claimed along the vein each way from such monument, and, within ten days thereafter, marked the boundaries of said claim distinctly by posts, at each corner thereof, with name of the claim and the corner it represented so that its boundaries could be thereby easily traced, all of said posts being at least four feet high above the ground and four inches in diameter, each being marked upon the side facing towards the discovery; and at the same time posted in a conspicuous place on the discovery monument a written notice of said location containing the name of the locator, the name of the claim, the date of discovery and a full description of said mining claim located by reference to natural objects and permanent monuments fully identifying the claim; that within 60 days of said location, said re-locator excavated and did the work required by law and within 90 days after the location of said claim, and subsequent to the excavation as aforesaid filed in the office of the County Recorder of said Blaine County, a substantial copy of said notice together with an affidavit duly made and subscribed substantially in form as prescribed and provided for under the laws of the State of Idaho, and performed each and every of the matters required to be done under the laws of the United States and the State of
48 Idaho, to initiate and constitute a valid and subsisting mining claim location.

32. That that part of the description in the location notice of the Malta No. 1 mining claim wherein it states that it joins the Independence mine on the north, was a clerical error and the same should have read "joins the Independence mine on the east;" the ground actually located at that time was made definite and certain by posts that were placed upon the ground showing that the Malta No. 1 was located so as to join the Independence mining claim on the east, all of which plaintiff had full knowledge.

33. That the old corner posts and lines of the Emma No. 2 mining claim were practically in the same position as the official survey posts marked 1, 2, 3 and 4 and lines of the Malta No. 1, as shown by the plat marked plaintiff's exhibit B, and the ground included in the old Emma No. 2 covered practically the same ground as it is shown to be covered by the Malta No. 1 mining claim on said plat.

34. That in said re-location of said Emma No. 2 as Malta No. 1, as aforesaid, all things and matters pertaining thereto were done for and in the interest of defendant, Nancy M. Kettler, and prior to the commencement of this action or the application for patent to Malta No. 1, A. J. Sullivan conveyed to defendant, Nancy M. Kettler, by mining deed, sufficient in form, substance and execution, the legal title to possessory right to said Malta No. 1 mining
49 claim; that after said conveyance from A. J. Sullivan to said defendant, defendant by mining deed conveyed to John T. Sears an undivided one-half interest therein, and thereafter and prior to the commencement of this action, John T. Sears conveyed to said defendant by mining deed, sufficient in form, substance and execution, an undivided one-half interest in and to said Malta No. 1 mining claim; that said Sears has no interest therein, all his in-

terest having passed to defendant, Nancy M. Kettler, and he having duly disclaimed on the record therein.

35. That during each and every year after 1904 until and including the year 1908, defendant, Nancy M. Kettler, and her predecessors in interest have performed at least $100.00 worth of labor in and upon said Malta No. 1 as annual assessment work, said labor being performed so as to develop and improve said mining claims.

*Conclusions of Law.*

1.

That the defendant, Nancy M. Kettler, is the owner of and entitled to the Malta No. 1 mining claim, and to each and every portion thereof, including the area alleged to be in conflict in this action and to possession thereof.

50

2.

That plaintiff is not entitled to any portion of the ground embraced and included in the Malta No. 1 mining claim, nor to possession thereof.

3.

That the defendant is entitled to a patent to the said Malta No. 1 mining claim.

4.

That the said defendant is entitled to a decree quieting her title to said Malta No. 1 mining claim, including the portion alleged to be in conflict with Independence No. 2.

5.

That defendant, John T. Sears, by reason of conveyance of his interest in said Malta No. 1 mining claim, to said defendant, Nancy M. Kettler, and by reason of his disclaimer filed herein, has no interest or estate whatever in said Malta No. 1 mining claim or any portion thereof.

6.

That the defendant is entitled to her costs and disbursements.

Dated Feb. 13, 1909.

EDWARD A. WALTERS,
*District Judge.*

Findings Filed February 15, 1909.

51

*Decree.*

This cause having come regularly on for trial on December 2, 1908, before the Court without a jury, a jury having been expressly waived by the parties hereto, plaintiff appearing by his attorneys, Stockslager & Bowen, and the defendant by her attorneys, McFadden

& Brodhead, Sullivan & Sullivan and Frank Reeves, and the defendant, John T. Sears, having filed a disclaimer herein, and the respective parties having submitted their proofs, and this cause having been submitted to the Court for decision, and the Court having heretofore made and filed findings of fact and conclusions of law, and being now fully advised in all the premises, it is here and now by reason of said facts and of the law by the Court considered, ordered, adjudged and decreed, as follows, to-wit:

1.

That the defendant, John T. Sears, has no right, title or interest in or to any portion of the Malta No. 1 mining claim, and that all his right, title and interest therein passed to the defendant, Nancy M. Kettler, by sufficient deed on March 2, 1908.

2.

That the defendant, Nancy M. Kettler, is the owner of, in the possession of and entitled to the possession of Malta No. 1
52 mining claim, and to each and every portion thereof, including that area alleged by plaintiff to be in conflict with Independence No. 2 mining claim; which said Malta No. 1 is situated in Warm Springs Creek Mining District, County of Blaine, State of Idaho, and particularly bounded and described as follows, to-wit:

Commencing at corner No. 1 from which the corner to sections 23, 24, 25, and 26, T. 4 N., R. 18 E., bears 17 degrees, 40 minutes, 35 seconds E. 4429.9 ft.; thence N. 6 degrees, 32 minutes E. 1442.6 ft. to corner No. 2; thence N. 87 degrees, 5 minutes W. 300 ft. to intersection of lode line, from which intersection discovery bears S. 6 degrees, 32 minutes E. 50 ft.; thence N. 87 degrees, 5 minutes W. 255.3 ft. to corner No. 3; thence S. 8 degrees, 18 minutes W. 1446.1 ft. to coner No. 4; thence S. 87 degrees, 5 minutes E. 600 ft. to corner No. 1, the place of beginning survey of exterior boundary of said lode claim. Magnetic variation at 19 degrees E. The said claim being located in the S.W. ¼ S.E. ¼ Sec. 14, and N.W. ¼ N.E. ¼ Sec. 23, T. 4 N., R. 18 E., containing an area of 18.881 acres.

3.

That said defendant, Nancy M. Kettler, is entitled to a patent of said Malta No. 1 mining claim from the United States.

53 4.

That the plaintiff has no right, title or interest in or to any portion of the Malta No. 1 mining claim; and has no right, title or interest in or to the ground described in his complaint, included in said Malta No. 1 and alleged to be in conflict with Independence No. 2 mining claim.

5.

That the title to and the possession of the said Malta No. 1 mining claim is hereby quieted in and to said defendant, Nancy M. Kettler.

6.

That the said defendant do have and recover of and from said plaintiff, Charles Swanson, her costs and disbursements taxed at $707.20.

Dated Feb. 13, 1909.

EDWARD A. WALTERS,
*District Judge.*

Decree Filed February 15, 1909.

*Certificate as to Papers Used.*

It is hereby certified that the following papers, to-wit: State-
54 ment of the Case, all of which are of the records or files in this case, were submitted to the judge and by him used on the hearing of the motion for a new trial, and constitute all the records, papers and files used or considered by said judge on such hearing.

SULLIVAN & SULLIVAN.
STOCKSLAGER & BOWEN.

*Statement of the Case.*

This cause came on regularly to be heard at regular October, 1908, term, to-wit: from December 2, 1908, to December 5, 1908, inclusive, before the Court sitting without a jury, Messrs. Stockslager & Bowen appearing as counsel for plaintiff and Messrs. Sullivan & Sullivan, McFadden & Brodhead and Frank Reeves, appearing as counsel for defendants, when the following proceedings were had:

Page 101 of Book 22 Quartz Claim Records of Alturas, (now Blaine) County, being the recorded location notice of the Independence No. 2 mining claim, made January 4, 1889, by Erik Anderson, Charles Swanson and R. R. Warren, admitted in evidence on behalf of plaintiff.

55 ROBERT R. WARREN, called and sworn on behalf of the plaintiff, and examined in chief by Bowen, testified as follows:

My name is Robert R. Warren and have lived in Ketchum for a little over 25 years. My present occupation is mining, sampling ores and buying ores and have been in the mining occupation for 25 years. I was born in Genesee County, New York; Batavia, in year 1849. I am the R. R. Warren who was one of the original locators of the Independence No. 2 claim in the Warm Springs Mining District in this County. The record which you show me in Book 22 of Quartz Claims Records of Alturas County (now Blaine), at page 101, is the recorded notice of the claim. I am very positive it is the recorded notice of the location of Independence No. 2. I am the R. R. Warren who filed that for record, and was present when the location was made. It was joined on the east end of

Independence. It was located pretty well on the top of the divide, but a little bit sloping toward Independence, between the Courier and Independence Gulches I was at that time well acquainted in and around the neighborhood of where this claim was located and in and around Alturas County. The Courier Gulch was a well known gulch and the Independence Gulch was a well known gulch. The Independence mine which is mentioned in this location was a well known mine at that time. I should judge there was probably about 16 or 17 thousand, possibly $18,000.00 worth of ore
56 taken out of the Independence mine prior to that time. Work had been going on a long time in the Independence mine prior to the location of the Independence No. 2. I located the Independence No. 2 in 1889; I think I became interested in it about the latter part of 1884, that is, indirectly interested backing up some parties that were prosecuting work on it and they had been running—been interested in the property I think possibly for two or three years previous to that time. I had been working the original Independence prior to 1889, five years. On January 3, 1889, when the Independence No. 2 was located, they had a small house there to live in and a fair blacksmith shop at the mouth of tunnel No. 2. There was some digging up on top which you could not really call tunnels—kind of surface discovery indications—there were two what you would call prominent tunnels. When the location of the Independence No. 2 was made there was a discovery made within the limits of the Independence No. 2 of rock in place containing gold, silver, lead and other precious metals. We measured the claim up and staked her out. I made sort of a preliminary survey of it and we measured the distances and erected our stakes at the proper points as near as we could estimate. We placed four stakes and I am quite sure we placed two end centre stakes at each corner of our location, also in the centre of the end lines, and one at the point of discovery. The stakes at the point of discovery were fir stakes about four inches in diameter and placed
57 four feet above the ground in compliance with the law. Mr. Charles Swanson, Mr. Erik Anderson and myself placed those corner stakes, end stakes and discovery stakes. They were my partners. We posted a notice on the discovery stakes, put the notice in a tin can and nailed the can on to the stake. The substance of what we wrote was that this is the discovery stake of Independence No. 2 or whatever claim we put it on. The location notice that is recorded is a copy of the original location notice that we planted in the tin can. The markings that we made upn the corner stakes and centre stakes was "this is the southeast corner stake", chipped that off with an ax—smoothed it off the best way we can—stakes designated "this is the east end centre stake" "this is the northeast corner stake." We made those markings to correspond with the proper corner which they were intended to indicate, or the proper centre. I am pretty sure we marked each of the corners and each of the centre stakes as I have indicated.

Book 47, page 6, called Mining Deed Record original records of Alturas (now Blaine) County, being a mining deed from Robert

R. Warren to Charles Swanson, dated October 22, 1895, for divers described mining property including an undivided one-third interest in the Independence No. 2 lode mining claim, offered and introduced in evidence.

On cross-examination the witness stated:

I am an ore sampler and have been engaged in the
58 sampling of ores about 13 or 14 years here. I got that from actual experience; I served a short time in sampling works to learn the business—in Colorado. All the practical experience was confined strictly at Ketchum—to me the very best experience was there in buying, handling and sampling ores—the most responsible. Have lived in Ketchum 25 years and during that time have been partially engaged in the hardware business. I am in the hardware business for myself now; prior to that time I was in the employ of Gillett & Evans. In describing this mining claim, the location of this mining claim, I think I have told about all anything of consequence. I made a preliminary survey of this claim before it was located. We extended on from the east end of the Independence.

Q. Did you know where the boundaries of the Independence were at that time?

A. I took the boundaries—took our boundary on No. 2 from the boundary of Independence No. 1.

Q. Do you know where the discovery was on the old Independence?

A. Well, now, yes; pretty close to where the discovery was, all dug up around there. The discovery on the old Independence was about 400 or 450 feet from the east end line, near the centre line of the claim. I could not tell you only by approximation how many feet east the Independence run from that discovery. We surveyed
from east end line. Immediately west of the Independence
59 was the Ida Harland; that was a patented claim. In making the description of my claim, I did not make any reference to the Ida Harland. When I was locating No. 2 I put up the discovery stake first. The discovery of Independence No. 2 was about 100 feet, if I remember right, east of; that would be the west end line of Independence No. 2. Did some work at the time I made discovery of Independence No. 2; the work was done shortly before we located, possibly two or three months. I was putting in the almighty dollar to help to get the work along all I could. The discovery stake I think was on the southwest side of the discovery cut. Where I did this work there was some ledge matter; it would not be noticed without a pretty sharp eye to detect it, and then dig a little scratch, you would discover the ledge matter.

Q. You did work enough there to tell that was in place, did you not?

A. Well, I considered it in place because I had taken careful note of the direction of the Independence ledge and through that formation ledges do not deviate very much unless it comes to an abrupt fault or something of the kind; of course there is sometimes gentle

faults but right through that formation there, I don't consider that there was anything serious to throw it out of line.

Q. Then basing your deduction over there from what you had discovered on the Independence lode, you concluded that was the same ledge there?

A. I did, yes. That was the basis of the location and the
60 discovery. I do not have any recollection as to how the discovery cut looked no more than it appeared to be a ledge matter and on the direct line that run on the trend of the vein. The cut was run from the west, easterly as near as I can judge from the appearance of things. I have been on the ground since the location was made, but not recently; have not been up there for several years. I extended the claim 100 feet west from the discovery, and about 1400 feet easterly. I could not really say which stake was put up after the discovery stake but I am inclined to think it was the east centre stake. We approximated the distance from the discovery stake to the end stake; the only way we can be positive is to take a surveyor up and have a genuine true survey made; in this case I took a tape line and surveyed it off to the best of my ability, I could not really tell which stake I put up next, whether I put up the southeast corner stake; that is so long ago that I have not thought of those things. I think there was about eight or ten inches of snow at that time, possibly a foot, maybe not more than six or four inches. Our southeast stake I think would be pretty close on top of the hill if my memory serves me right. I think that would be about the highest point on the ground. Mr. Charles Swanson and Mr. Erik Anderson were with me when I located the stakes.

(REEVES:)

Q. You identify the affidavit that you filed here touching the location of that claim, do you not?

61 A. Yes, sir.

Q. Don't you know as a matter of fact that the ground that you said in that affidavit was vacant, was located as the Emma mining claim No. 2?

(BOWEN:) Objected to as immaterial and not proper cross-examination—the same reasons as stated before.

(COURT:) It appears in different shape now. I think he may answer.

[Exception.]

(REEVES:) You know the Emma No. 2 was located there and that you were locating over it, did you not?

A. I understood the Emma location had been made previous to that time.

Q. You knew that there were stakes on the ground there, did you not? Did you not run across some stakes when you were making the location of the Independence No. 2?

A. It strikes me that I noticed a stake there somewhere right near by.

(BOWEN:) Object to that and move to strike it out as not being

proper cross-examination; the question of stakes is absolutely outside of our case. That has not anything to do with the record.

(COURT:) It may bring home to the knowledge of the locator that there had been a prior location there.

(REEVES:)

Q. In fact the discovery you made for Independence No. 2 was on ground that was then staked as Emma ground No. 2.

62 (BOWEN:) Objected to as improper cross-examination. I call the Court's attention that there is not anything in the record about the discovery of any other claim; he does not make an affidavit that there were any stakes existing. This is entirely a matter of their own case, a matter that we have not touched.

[Argument.]

(COURT:) I shall sustain the objection. You could call Mr. Warren as your own witness if you want to prove that matter by him.

[Sustained.]

[Exception.]

(REEVES:)

Q. This affidavit you have identified as having sworn to, you said to the best of my knowledge and belief the ground had heretofore not been located according to the laws of this state, or if so located, the same had been abandoned and forfeited. Which one of those matters do you really rely upon in this affidavit? Did you mean to testify that the ground that you were locating then had not been located, or had been located and forfeited?

A. According to my understanding, the ground that had been located but that the location had been forfeited.

Q. Upon what assumption did you decide it was forfeited?

(BOWEN:) Object- to as improper cross-examination.

[Overruled.]

[Exception.]

A. Put the question again, please.

63 (REEVES:)

Q. Upon what assumption did you proceed in claiming it was forfeited?

A. Upon the assumption that they had done their assessment work that year.

Q. In the year 1888 or 1889?

A. 1888.

Q. Then when you made this affidavit here, did you know that of your own knowledge?

A. Quite positive of it.

Q. How do you know that?

(BOWEN:) Object to that as immaterial and improper cross-examination. The affidavit states to the best of his knowledge and belief, and their question is not proper.

(COURT:) I think he may answer.
[Exception.]

(REEVES:)

Q. How did you know the assessment work on Emma No. 2 for 1888 had not been done?

A. By making very close inquiry, going up there and looking around occasionally and having the parties that were interested watch the thing very carefully who was residing around very close in the vicinity.

Q. Who were those parties you had watching that?

A. Mr. Swanson and Mr. Anderson.

Q. Did you and Swanson and Anderson have it in your minds that you were going to jump the claim or cross it, and were keeping an eyse on the Emma No. 2 to see if the assessment work was not done so it would be open to location?

64 (BOWEN:) Object- tc as not proper cross-examination.
[Objection sustained.]

(REEVES:)

Q. Were there any other parties other than those you have mentioned, you had watching that matter?

(BOWEN:) Object- to as improper cross-examination.
(COURT:) He may answer.
[Exception.]

A. Not directly.

Q. Were there some indirectly?

A. Well if there were, the parties didn't know it themselves.

Q. You knew where there was a cabin located over on Emma No. 2, didn't you at that time?

(BOWEN:) Object- to as improper cross-examination.
[Sustained.]

(REEVES:) It is preliminary, laying the foundation for a question to follow it up. I propose to ask him the question later if he were there himself.

(COURT:) He may answer.
[Exception.]

(REEVES:)

Q. You knew there was a cabin on the Emma No. 2, did you not?

A. I knew there was a cabin on the Emma ground; now when it comes to say what claim it was on, I could not tell you because I never paid any attention to it. I saw there was a cabin there. I was over to their cabin a few times.

65 Q. You know that was on the claim running in a southerly direction up where the Independence was going across?

(BOWEN:) Object- to as not proper cross-examination.
[Overruled.]
[Exception.]

A. I think not in December.

(REEVES:)

Q. When did you go there?

(BOWEN:) Object- to as improper cross-examination; this is entirely off the ground.

(COURT:) Yes, of course, I take the statement of counsel that he will follow it up.

(REEVES:) I didn't get the answer I anticipated; I intend to follow it up.

(COURT:) He may answer; objection overruled.

(REEVES:)

Q. I ask you when you were there?

A. On January 3rd, 1889. That answer is an approximately correct answer. I didn't say the location of the Independence No. 2 was about 100 feet west of the east end line, neither did you ask me anything of that kind. You asked me where the discovery stake was. I have not been there for several years; I could not just state without getting down and scratching and thinking. The last time I was up there was along after I sold out. I do not know the year; I presume probably the last time I was there was three years ago or two years ago or four years ago. I was not up to the discovery cut of the Independence then. When I did the discovery
66 work at the cut where the notice was posted, location of Independence No. 2, there were some holes dug up around here and other prospect holes. They were all near where I made the discovery. They were on a line with the vein, different points east and west both. I don't know whether the discovery is still there or not. I do not think there were any good sized cuts there at that time, none five feet deep. I cannot say that I know of any cuts made over there on the Emma claim. It might possibly be that our vein may crop into the southwest end line of the so-called Emma. I saw diggings there that my partners dug prospecting along on the crop of the vein. I refer to Mr. Swanson and Mr. Anderson. I saw them dig it; I was up there one time myself and accompanied them; accompanied Swanson and we went up and looked over the situation; looked over the ground.

Q. Do you mean to testify that there is no cut whatever on that ground 100 feet east of the line between the Independence and the Independence No. 2?

A. 100 feet east of the west end line or dividing line between the two Independences?

Q. That is it.

A. Do I pretend to say there is a cut there?

Q. It depends on what a man calls a cut. *Q.* What do you mean by a cut when you testify to cuts?

A. I didn't testify to any cut.

Q. You have not testified to any cut?

67 A. I don't think I did. There was a hole in the ground at the time we located the ground; the ground was kicked up

there possibly five or ten feet. I could not tell you how deep or wide it was, nor how long it was; there was a hole in the ground. It was 100 feet east from the line; might not have been more than 74 or might be 125; the discovery stake says 100 feet so that must be conclusively 100 feet. The discovery could not have been made 142 feet east from the end line. After I put those stakes there on the 3rd of January, 1889, on the Independence No. 2 I never changed them. I did not see anybody else. I do not know whether they have been changed or not. The northwest corner stake of Independence No. 2 stands on the corner that is all I can specify about that. I have not seen the stake since the day it was drove. I think the stake was on kind of a slight slope a little to the northeast; I think the ground slopes a little to northeast there but I would not be positive about that because in fact these little details never interested me very much. I was not one of the original locators of the Independence No. 1.

*Testimony of Erik Anderson.*

My name is Erik Anderson, reside in Colorado, age 53, and my occupation is farming. I resided in Warm Springs Mining District in Alturas County (now Blaine), in this state, from May 1883, first time, until October 1885; then I came back in 1887 and resided until 1891. I have followed mining for an occupation,
68 began in 1875 and have followed it more or less ever since until about 11 years ago, then I took to farming. I was engaged in mining in Colorado first and then in this state. I was interested in mining in Wood River since I came here until the time I sold out. I was interested in mines of my own, and during that time I was engaged in prospecting; from 1883 to 1885, and then here again from 1887 to 1891 I was engaged in prospecting. I was engaged in prospecting in Colorado. I have had 30 years' experience as a miner and prospector. I was acquainted in 1889 with the Independence Gulch, and also the Courier Gulch. They were five miles east of Ketchum. The Courier Gulch was east of the Independence Gulch. There was a divide between them. The Indpendence Gulch and the Courier Gulch were well known gulches at that time, known generally to prospectors. In 1889 I was interested in the Independence No 1 mine; it was a well known mine to prospectors at that time. I assisted in the location of the Independence No. 2 lode mining claim; that was done on the 3rd day of January, 1889. Mr. Swanson and Mr. Robert Warren assisted me in the location of it. The mine was located on the divide between the Independence Gulch and the Courier Gulch, east of the Independence mine. It joined the Independence mine on the east. It was staked. There was a stake placed at the discovery, and then it was—I think it was four corners, centre side line, the east centre end stake; just the way they always stake. There were four
69 corners, one at each corner of the claim. At the point of discovery there was a stake, and on the east and west and

west centre end lines, and one at the centre end line. They were large stakes, about four inches in diameter, and were about four or five feet above the ground. They were marked to designate the place they were put, the particular corner or end line or centre end line were marked on the stake. The discovery stake was marked as the discovery stake and the name of the claim put on it. There was a copy of the location notice put in a tin can and nailed on to the stake; on the discovery stake. Prior to the location, Mr. Swanson and myself made a discovery of rock in place bearing gold, silver, lead and other precious metals. The discovery that I had made previous to the location was within the lines I staked out. The stakes as they were placed at the time made the west end line of my Independence No. 2 join the east end line of the Independence No. 1, as they were on the ground January 3, 1889. The discovery was 100 feet east of the west end line on the Independence No. 2. The east end lines were placed 1400 feet of that. It was measured with a tape line. They were placed there where we found the measurement of 1400 feet as near as we could get it. I was born in Sweden in 1855 and have a copy of my naturalization papers.

Certificate of Naturalization of witness, Erik Anderson, showing date of naturaliztion to be January 16, 1882, in — County,
70 State of Colorado, offered and admitted in evidence as "plaintiff's Exhibit A."

Page 297, Book 49 Mining Deed Record of Blaine County, being record of deed from Erik Anderson to Chares Swanson, dated January 8, 1900, recorded January 27, 1906 conveying with other property an undivided one-third interest in and to the Independence No. 2 lode mining claim, offered and admitted in evidence.

It was here admitted that all records heretofore or hereafter offered or introduced in evidence as county records are in fact the records of which they are offered or introduced, unless specific objection is made at the time of offering or introduction.

It was here stipulated and agreed that the witness, Charles Swanson, might file his certificate of naturalization, or declaration of intention to become a citizen, or certified copies thereof, within ten days hereafter, as evidence herein, all objections being waived, except the sufficiency of the document which he files proving citizenship.

In accordance with said stipulation a certified copy of a certificate of naturalization is set forth hereafter.

Cross-examination of ERIK ANDERSON:

On cross-examination the witness stated:

I was born in Sweden. At the time I located the Inde-
71 pendence No. 2, I located it on the east end of the original Independence; we tied to the east end of the original Independence. The end line of the Independence No. 2 is flush with the end line of the old Independence. We established the original east line of the Independence when we located the Independence No. 2. The Inaependence stakes were not where they belonged

when I located. We established it. The southeast corner stake of the Independence No. 2 must have been over the hill, if I remember, over on the Courier Creek side. I made the discovery myself on which the location of No. 2 was made, sometime during the summer of 1888. When the discovery was made in the summer of 1888, I did not find any work already done. I ran in an open cut, dug into the hill and was tracing the Independence lead and I found it ran in probably 20 to 25 feet and I found out I was a little too high and I got on top of the vein; I got some quartz in the bottom and on the sides, and I sank down until I got grey lime which we call the foot-wall. The work I did was in the nature of an open cut. That was east of the west line of No. 2, 100 feet. When we located the claim, I measured it with a tape line. Mr. Swanson, Mr. Warren and myself did the work together. I have been to the claim recently—was there last week. I saw a box posted containing a plat of the official survey of the Independence No. 2. It was posted west of the discovery shaft of the Independence No. 2.
72 The discovery of the original Independence is west of there. I went over there to look over the ground and take in the situation for the purpose of giving testimony in this case—to refresh my memory. I cannot say that I recollect a cut about 30 feet west of where the box is posted. There is a little cut right between the original discovery, and there are some cuts farther east. I think the biggest cut is really where the discovery is on the original Independence. When I was up there last I went to the discovery of the Independence No. 2. The box is west of the discovery. The discovery of the original Independence is west of the box. There is a little cut between the discovery of the original Independence and the discovery I made for the Independence No. 2, and there are some cuts farther east. I should judge the box was not over 200 feet west of the discovery of the Independence No. 2. When I went back there this time I found the discovery cut of the Independence No. 2 because I knew where to find it. It is an open cut or sink down a few feet; back of the face of the open cut I sank down through the ledge; I found the ledge and sank down to the gray lime. I mean I sank down at the time the discovery was made; didn't mean I sank down when I went back there this time. The cut was caved in more or less this last time. The discovery cut was on a due line east of the discovery of the original Independence. The discovery of No. 2 is east of the discovery of the original Independence about 200 feet. The discovery on No. 1 is on the
73 east side of the slope. When I was back there this last time I went to the discovery of the old Independence. I made an examination of it. The cut on the old Independence must be about 30 feet long and about four or five feet wide. I remember some boulders there, but I can't remember any particular one. Mr. Swanson and Mr. Bowen were with me when I went up there the last time. When I located No. 2, I set new stakes up for the old Independence.

Q. How did you come to do that?

A. Well, shortly after we had bought into the original Inde-

pendence we found that the location called for 100 feet east and I have forgotten how far west, but anyway it joined the Ida Harland on the west and by measuring the ground we found that there was in the neighborhood of 275 feet to what was then the Emma mine and we realized some day that when we come to survey for patent, we had to move these stakes in. We called for 100 feet east of the discovery and we found the stakes were 275 feet east of the discovery. We knew then that there would be a fraction in there when we go to survey for the original Independence. Well, time went on and we left the stakes remain there. We finally, in 1888, we were tracing the Independence vein, made a discovery there, but we did not locate; we did not locate. As it existed then we could only get a claim 175 feet long. That is why we didn't locate then, but the discovery was made.

Q. As you had the old Independence, the old Independ-
74 ence stakes were set out on the Emma No. 2 line?

A. Yes, they were set out on the ground that afterwards got to be Independence No. 2; yes.

Q. In 1883 is when you gained your interest in the old Independence?

A. Yes, sir. I know Joe Heller. I believe he was the owner in August, 1883. I don't recollect that we ever had a conversation in regard to the stakes. We set the stakes back when we established the east end line of the Independence No. 2; we had at the same time established the east end line of the original Independence. That is the first time I had ever moved the stakes of the original Independence. I didn't move them in 1884, I am positive of that. Never was any stake set in 1884. I was on the ground and saw them standing there; they were in the same place then that they were when they were located. They were in the same place then that they are now. Those stakes, after we had the two end lines, the east end line of the original Independence and the west end line of the Independence No. 2, when we had that line established, we knocked down the other stakes. I don't remember where I put them. There was no Emma on the 3rd day of January, 1889, it was forfeited. I knew the ground over which I located the Independence No. 2 was occupied in 1888, a person had a location of it. The original Independence joined the Ida Harland on the east, the
west end of the Independence. The original Independence was
75 a short claim. The Independence was a short claim. Yes, the Emma was already located when the Independence was located, and the Ida Harland was located, too. The distance between the two would not quite make 1500 feet. We didn't locate a full 1500 feet on the old Independence; we bought into the original Independence. I have forgotten how far it was from the location of the Independence to the Ida Harland mine, but it was not 1400 feet; I am sure it was more than 900 feet from the discovery; I should judge it was 1000 feet and maybe more. It is in the neighborhood of 200 feet between the discovery of the old Independence and the Independence No. 2. The distance from the discovery of the original Independence to the east end line of the Independence is 100 feet. It

could not be much less; if the official survey of that shows 64 feet, it is wrong. I helped stake the Independence No. 2 on the 3rd day of January, 1889. I knew about where the northeast corner stake of the Independence now stands; I did not go to it; I didn't go very far from the discovery. My examination was altogether on the west end. I don't know anything about the northeast corner stake of the Independence No. 2 being moved in about 500 feet from where I located it. I went probably 100 feet from the discovery.

Q. Do you know where some work was done close to the west side line on the Emma in 1884?

A. There was not any work done there in 1884.

76 Q. There was some work done in 1883?

(COURT:) You see this map and the record so far is absolutely devoid and any reference to the Emma claim; it is maintained that it corresponds somewhat with the Malta No. 1.

(BOWEN:) That is the reason we say a great deal of this cross-examination is absolutely immaterial and not proper cross-examination at this time. We think about half of it could be shut out.

(REEVES:) The question here now, is the fixing the location as it was then.

(COURT:) Proceed.

(REEVES:)

Q. You say work was done in 1883?

A. Right on the end of the old Emma—on the side line of the old Emma.

Q. How far from the side line of the Emma was that?

A. Right on the line.

Q. How many cuts were there there?

A. Two cuts.

Q How far east of that was the discovery on Independence No. 2?

A. That was not east of that; the discovery of Independence was west.

Q. How far west then?

A. About 75 feet.

Redirect examination:

On redirect examination the witness stated:

77 I never had anything to do with the Emma No. 1. The east end line of the Independence No. 1 was established in 1889. We found that the stakes for the east end line of the original Independence was too far east from the discovery. The stakes at that time were about 275 feet from the discovery of Independence No. 1. I withdrew them in 175 feet which left them 100 feet west of the discovery of No. 2—left them 100 feet of the discovery of the original Independence. The end line as re-established between the two Independences was equi-distant between the original discovery points. Those two cuts which I speak of were made in 1883; were 75 feet east of the discovery of the Independence No. 2. The cuts that were made in 1883 were made on the west side line of the Emma.

Cross-examination:

I did not make this re-establishment of the lines because the stakes as originally established were out on the Emma ground. We made them to conform with the record of the original Independence. When we were making them conform with the record we did not file any amended location; we didn't understand we had to; we could pull them in but we could not push them out. When we found out it was a mistake, that was in 1883; when we moved them, that was in 1889. We had a motive for leaving them all that while because we wanted to locate this fraction in there. If the stakes on the original Independence were 275 feet from the dis-
78 covery of the Independence, it would not necessarily throw the stakes on the Emma ground. They would be on the line of the old Emma. We pulled the stakes back so as to make some vacant ground to locate.

Redirect examination:

When we pulled back the stakes in 1889, we were able to get a full claim then.

Q. Explain why it was you pulled them back in 1889, at that time, and not before?

A. We had a motive in leaving them there because we held the ground that way—at least there was not anybody interfering with us.

(COURT:) I can't understand you.

A. We left them there because it didn't leave any open space in there. It closed up the gap between those two claims; it was not generally understood between us that it was vacant ground in there, and they were left there for that purpose. We could locate this vacant ground any time, but we did not like to locate it as a fraction. We thought we rather wait development and see if we could not get a full claim some day; that is the reason why we didn't move the stakes in any sooner than we did.

Recross-examination:

(REEVES:)

Q. Didn't you tell me a few minutes ago that you moved those stakes back off the Emma ground on to the side lines of the Emma?

A. No, sir.

79 Q. Didn't say that?

A. No sir, I beg pardon, I did not.

Q. That is what you did do, is it not?

A. Haven't you got down my testimony there?

Q. Is not that what you did?

A. We moved them off of the Emma line, the Emma side on the 3rd day of January, 1889, and we put them 100 feet east of the discovery on the original Independence where they belonged. We never claimed any more than what was on the record. We had the stakes out on some ground that we did not claim, and we pulled

them back to conform with the record. When I pulled those stakes back we did not measure to see if that stake down to the stake next to the Ida Harland measured 1500 feet. The real reason I moved those stakes at that time was to make some vacant ground in there on which I could make the location of the Independence No. 2. We wanted that ground because we had the discovery made there for the location. We never changed the line, we changed the stakes; the stakes were put in the wrong place acording to the record. I am sure I was in the country in 1888. I am positive I was there on the 3rd day of January, 1889. Mr. Swanson is my brother-in-law. Mrs. Swanson is my sister. I had no trouble with them in the fall of 188-. I had no trouble with them before I went to Colorado in the fall of 1888. I went to Colorado in 1885 and stayed there until July, 1887, then I came back to this
80 country. I stayed here then until the 20th day of December, 1891. Never was out of the country at all.

Redirect examination:

Q. The discovery you speak of as being the discovery for the Independence No. 2, where was that with reference to this fraction between the Emma side line or where the Emma side line was; the west side line and the west end line of the Independnce No. 2 at the present time?

A. It was just about 100 feet west of where the discovery is of the Independence No. 2, on that fraction, about 75 feet west of where those old stakes were. When this discovery was made by me it was within the stakes of the Independence No. 1. When I withdrew the lines in the discovery was within the limits of the new location which I made of the No. 2, and in this fraction.

Recross-examination:

I was speaking about 75 feet from the holes that were dug; that we dug on the west side line of the Emma in 1883. Those holes are right on the side line; there were stakes up then; I sighted through from the stakes, the stakes on the Emma; the Independence No. 2; the old Independence stakes were there too.

Q. You sighted from the Emma stakes when you determined those cuts were close to the side line of the Emma?

81 A. I don't remember just how I sighted; I know they were on that line at that time.

Q. When you told me you sighted through on the Emma, did you remember it then?

A. Certainly we sighted; we could not tell any other way.

Redirect examination:

Q. Those holes on the side line, what reason was there for digging them on the side line in 1883?

A. Mr. Heller was trying to find the Independence lead. I discovered it prior to that time. We first discovered it at the discovery and then we bought in and then we discovered it west on

the hill on the other slope late in the fall in 1883. Those were dug as far west on the Emma line as possibly could go for the purpose of discovering that line or vein.

*Testimony of E. S. Anderson.*

E. S. ANDERSON, called and sworn on behalf of the plaintiff, and examined in chief by Bowen, testified as follows:

My name is E. S. Anderson, am a civil engineer and live at Pocatello at the present time. I have had experience in drawing maps and making surveys of mining claims. (Map marked plaintiff's Exhibit B offered and admitted in evidence.) I did the drafting of the map from the copies of the official survey made by
82 myself. Official surveys of the Malta No. 1 and the Independence No. 2. This map with directions and number of the corners represents the survey of Malta No. 1 as surveyed for patent. I made the survey for the Independence No. 2 from the posts on the ground—the markings. William Monks or Charles Hartman assisted me in the survey of the Independence No. 2, and E. P. Russell and E. M. Grim assisted me in the survey of the Malta No. 1.

Q. I will ask you if this describes properly the Independence No. 2 location, directions and distances made from the posts upon the ground as placed by you for patent at that time. "Beginning at corner No. 1 of the said Independence No. 2 claim, which corner is north 5 degrees, 31 minutes, 50 seconds west 4482.8 feet from the corner of section 23, 24, 25 and 26, township 4, north 18 east Boise meridian, running thence from said corner No. 1 south 85 degrees 57 minutes west 1500 feet to corner No. 2 of said claim; thence north 16 degrees, no minutes west 570 feet to corner No. 3; thence north 84 degrees, 48 minutes east 1494 feet to corner No. 4; thence south 16 degrees, no minutes east 600 feet to corner No. 1, the place of beginning, containing 19.702 acres section 23, T. 4 north, R. 18 E. B. M." Is that the correct description as made by you on this plat?

A. It is, all but the acreage; I don't understand the acreage.

Q. 19.702?

A. Nine acres in conflict, you mean?

83 Q. No, that is the total area.

A. I don't know the acreage.

Q. Then I will ask you if from the survey made of the Malta No. 1 for patent, whether or not the following is a correct description of the area in conflict between the Malta No. 1 and the Independence No. 2? Beginning *at* at a point on the southerly side line of the Independence No. 2, United States survey, 236, where the same intersects the easterly side line of the Malta No. 1, U. S. survey, which point is north 6 degrees, 32 minutes east 197.3 from the corner of No. 1 of said Malta No. 1 claim; thence south 85 degrees, 57 minutes west 894.9 feet from corner No. 1 of the Independence No. 2 claim.

A. Correct.

Q. South 85 degrees, 57 minutes, running thence north 6 degrees,

32 minutes east 584.2 feet to the intersection of the northerly side line, south 84 degrees, 48 minutes west 589.5 feet to the intersection of the westerly side line of Malta No. 1 claim; thence along said westerly line south 8 degrees, 18 minutes west 575.74 feet to the corner No. 2 of Independence No. 2 claim; thence along the southerly side line of the Independence No. 2 claim north 85 degrees, 57 minutes east 605.1 feet to the place of beginning, containing 7.777 acres. I will ask you if that is a correct description of the area in conflict?

A. Yes, sir; and this map which has been marked Plaintiff's Exhibit B, indicates the area in conflict.

(SULLIVAN:) It is admitted by the plaintiff that the plat
84 now offered in evidence is identical; is a true and correct copy of the plat filed as an exhibit with the adverse claim in the U. S. Land Office and which is referred to in said adverse claim and adverse proceedings.

(BOWEN:) We admit that.

I made the official survey of the Malta No. 1 on October 25 and 26, 1907. I was first on the ground on October 3, 1907, with reference to the survey. At that time I made an examination of the ground for the purpose of determining the location of the stakes and markings. The Malta north line stakes are up. The stakes as shown here marked the location corner, corner No. 4.

Q. Stake No. 4, on the Malta?

A. On the ridge, that stake was in place and it was marked. The stake existed on the ridge. Stake No. 1 is near the south boundary line of the Independence No. 2 on what is termed the ridge; that had no marks on it. Across the ridge in the hollow was a pile of stone, which I have marked stones on the map; had no marks on.

Q. With reference to this plat which we have here, I call your attention to a dotted line which runs in a southerly direction from corner No. 3 of Malta No. 1 claim, which runs between the side line of the Malta official survey and what is marked as the supposed side line of the Emma, and ask you what that line indicates on this plat?

A. That represents the first survey that I made for the
85 Malta on October 3rd, for the Malta No. 1.

Q. Was there a stake on the corner of that which is shown on the plat?

A. No sir.

Q. Running west from that we find another dotted line running east to another stake. I will ask you if there was a stake there?

A. There was at that point.

Q. Was that stake marked?

A. No sir.

Q. I will ask you if this official survey which is marked here on this plat, if there was a stake at the corner No. 1 of the Malta location?

A. Official, the official survey made there was a stake immediately 80 feet east of that.

Q. Was it marked, if at all?

A. It was not marked.

(BRODHEAD:) Have Mr. Anderson give the description.

A. South 87 degrees, 5 minutes east 80 feet, location from the corner No. 1 Malta lode.

Cross-examination:

Corner No. 4, Independence No. 2 was a stake over there marked northeast corner Independence No. 2, about 500 feet from the present corner No. 4 of the Independence No. 2. We pulled that stake in 500 feet. At corner No. 1 there is a stake marked southeast corner Independence No. 2. We pulled that stake in 315 feet. When I went upon the ground I found that the Independence No.
86 2 as staked was 2000 feet long on one side and something a little over 1800 feet on the other. Mr. Swanson showed me the stakes on the east end of the claim. He represented at that time those were his corner stakes.

Q. Who showed you, if anyone, where to run this dotted line that runs south?

A. I tried this; was supposed to be the southeast corner on the ridge.

Q. Who told you that that was that stake?

A. Swanson and Sears were there; he said he didn't know how he stood but he understood those stakes were about right. That line is just a supposed line. The first time I went up on the survey of the Malta, Harry Allen went with me. He was on the ground when the first survey was made; that is, he was at the mine.

Q. This you have testified as shown in a supposed line; there was nothing there at all to designate where that line was run, was there?

A. Nothing marked, no stakes marked with the exception of this small stake given in here as three inches by three inches by a foot and a half above the ground 348 feet north 84 degrees, 48 minutes east from corner 3 Independence No. 2. That stake is about half way between the end lines of the Malta No. 1. There is nothing down at the other end, never any placed there. There was no stake in place marked corner No. 4 on the Malta No. 1. One marked the southwest corner of Malta No. 1. The other lines are supposed boundary lines.

87 Q. Calling your atteniton to the point marked discovery on survey 236, is the discovery of Independence No. 2?

A. That is my understanding of it; yes.

Redirect examination:

Q. Calling your attention to the stake which is on the ridge, on the saddle near the centre of the south end line, side line of the Independence No. 2 and running thence in a westerly direction 600 feet and squaring your claim with the points—corners marked 2, 3 on the northerly part of the Malta No. 1 claim, would that dotted line which is indicated there and which you have testified to, be a correct survey?

A. Yes sir.

Q. As to such claim?

A. Yes, within those points; yes, within those stakes.

Q. Calling your attention to stones which you have already testified to in the southeast part of the Independence and the stake which you have testified here as being on the ridge, the corner No. 4 of the Malta official survey: I will ask you to state if those could be used as corners of the claims in making a survey, and if so, what direction it would be necessary to run your survey? If they were correct corners, which way would the claim run?

A. It would have to be shown on the dotted line to fall within those stakes.

Q. You mean as to squaring it here?

A. Yes sir.

88 Q. Could you square your claims with the corner No. 1 and the stakes on the saddle near the south boundary and side line and the stones so as to run in a northerly and southerly direction and be square with the corners which were represented to you as being corners?

A. Could not be square, no.

Q. Why did you run the survey in a westerly direction from corner No. 4 to corner No. 1? What was the reason for that?

A. Mrs. Kettler claimed that stake was not her stake. Stakes that were standing on the saddle and in these stones were not her stakes, and I went up and made the survey—official survey. I squared it from corner No. 4. Ran my corners as indicated in the map to corners No. 2 and 3. The stake on which I base my first survey was made from representations made on the ground by Swanson and Mr. John T. Sears. Squaring it from there with the corners 2 and 3 make the survey run as indicated by the dotted line which is in evidence.

Recross-examination:

The location corners at 2 and 3 were up. They were not marked Malta No. 1. I got the direction of the southerly end line by running parallel to the north line. I established the north line first. As a matter of necessity under the law I had to make that end line parallel. I found in running this southerly end line that the stake which sets out 80 feet was on exactly the same course, but

89 only 80 feet off from where I established the corner, so that if this was the location corner of Malta No. 1 I pulled that in in one direction—didn't make the location corner 80 feet from corner No. 1, I pulled that in 80 feet. Referring to the dotted line running from corner No. 2 of Survey 2337 Malta No. 1 lode, to the point marked stake on ridge, it would be 1216½ feet between the two points. That would lack practically 300 feet of being a full claim. The same thing would apply to the line running from corner No. 3 of the Malta No. 1 to the point to the southwest corner of what appears to be the dotted claim. Providing these dotted lines were the lines of the Malta No. 1, it would not be a full claim, Mr. Swanson showed me the discovery of the Independence No. 2.

*Testimony of Charles Swanson.*

CHARLES SWANSON called and sworn on his own behalf testified as follows:

My name is Charles Swanson, and the plaintiff in this action. Am 59 years old, and lived at Ketchum the last 25 years. Have been following mining and prospecting for 38 years in Colorado, Nevada, California and this state. I am acquainted with the Independence No. 2, located on the divide between Courier Gulch and Independence Gulch and east of the original Independence. I have been acquainted with that vicinity since July, 1883. I lived at the Independence mine during the past few years since
90 1889. I had a home and family there. I was one of the original locators of the Independence No. 2. It was located in company with Robert Warren and Erik Anderson on the 3rd day of January, 1889. The location was made east of the old Independence. We staked the claim; put up the discovery stake in the first place and then we moved from there and west to the east centre. The discovery stake was just 100 feet from the west end line. We had, prior to that time, made a discovery of rock in place bearing gold, silver, lead. After placing a monument at the discovery point, we put up the east centre stake; that would be 1400 feet from the discovery. We then put up the southeast corner stake, then the northeast corner stake, then the northwest corner and then the southwest corner stake. Those corners were marked by me indicating the corner of the claim. We used posts four inches in thickness, some probably six inches, and placed them substantially in the ground between four and five feet high. As located at that time the claim extended east and west; about 1400 feet east and 100 feet west of the discovery. We posted a location notice in a tin can and it was nailed right on to the discovery stake, with the date of discovery, name, etc., marked. I have, until two years ago, been in possession of that claim. Since 1889 I have performed $100.00 worth of labor and improvements upon the Independence No. 2 claim each year. The work had been performed in the
91 ground and in one of those tunnels, the original Independence. Since 1889 we have run probably 2000 feet of tunnel work on the Independence No. 1. I have been the owner of the Independence No. 1 since then. The work that I have been doing upon the Independence No. 1 has been beneficial to the Independence No. 2. I am familiar with the survey made by E. S. Anderson of the Independence No. 2 and the location of the different corners of the Independence No. 2. I know where the survey stakes were placed by Mr. Anderson. The west end line as shown by plat and survey of Mr. E. S. Anderson are practically where it was in 1889. We found the claim too long on the east so when we came to survey for a patent we had to pull them in. Since 1889 I have kept my stakes and posts of the Independence No. 2 in place. I go over them twice a year, in the spring and in the fall.

Cross-examination:

I could not tell whether anybody saw me doing that or not; somebody might have watched me from some point; I never remember of any one watching me. We had so much stock in the country and they would destroy; I found them destroyed by sheepherders making camp fires. I always had a pile of rock piled around those stakes. I would go around and see those stakes about twice a year, all around my claim. On the west end the corner stakes of the Independence No. 2 were the same in 1889 as they are shown
92 on this map. When we staked out the Independence No. 2, we had a tape measure to measure the ground. I am satisfied we made a mistake in measuring. We didn't make any mistake in measuring the west end. I know where the cabin stands on the Malta No. 1. You can see the stakes of the Independence No. 2 from that cabin. Those stakes have been in the same place since 1889. I would make the rounds in the spring after the snow goes off. The stakes would be buried in the snowbanks and it would be sometimes in the middle of the summer before we could find them. I had stakes up also for the east side of the old Independence.

Q. Where are those stakes on the east of the old Independence with reference to the west stakes of the Independence No. 2 are?

A. Practically on one stake. When I located Independence No. 2 I used the east line stakes of the old Independence for the west line stakes of the Independence No. 2, so when I pulled the stakes back in on the Independence No. 1, I pulled the whole claim back. The stakes on Independence No. 1 were never moved prior to 1889. When I went to move them back they were up and in place. Before we pulled them back they were located on the original line of the Emma location. They were right on the line. Was flush with the Emma line. The cut was done sometime in the fall, along about September or October. We did some work then. We run a cut in from the northwest—run in here probably eight or ten feet, and we discovered by the flow of the formation that there was a
93 prospect you can tell by, that we was a little high, so we sank right in this cut and discovered the vein. The identical cut was on the Independence ground when I discovered it in 1888. I have been on the ground recently. The box containing that plat of the discovery of the Independence No. 2 is a little east of the west side line—end line of No. 2 and also east end lines of Independence, very close to the line. It would be very close to the east end line of the Independence and the west end line of the Independence No. 2, on the east side of the east line. I have been on that hill several times. I was up there not many days ago. I was just merely up with my brother-in-law, Erik Anderson, who came from Colorado; we were camping at the Elkhorn, and he came out there to stay, and asked me if I would go up there, he would like to see the old stamping ground, so I went up with him. I know where the discovery of the old Independence is. It is pretty near due west of the discovery of the Independence No. 2, about

200 feet. I measured it in the early eighties and have measured it since to be correct. After we examined the records and also found the location notice, we all bought into this claim, we found the record says we could only claim 100 feet east of the discovery, and when we came to measure it, we found 275 feet instead of 100. We did not find our stakes sitting on the Emma ground, it was sitting square on the line. I know where the northwest corner of the Malta is; I have got staked one of my claims right
94 next there.

Q. The northwest corner of the Malta No. 1 is in the same place, is it not, that the northwest corner of the Emma No. 2 was?

(BOWEN:) Object- to, unless this testimony is with reference to something in connection with the location of the Independence No. 2; in other words, I object to proving by this witness anything with reference to the old Emma location at this time.

(COURT:) That is sustained, if that is the purpose. Proceed.

(Question read.)

A. Yes.

(REEVES:)

Q. That is a fact, is it not?

A. Yes sir. I determined where the Emma line came because I went right behind those corners and drawed my line, that is, I drew my line from the northwest corner stake to the southwest corner stake. I could not tell you whether I drew it directly north and south because I never put any compass on it, but it is pretty close to being north and south. I took from the southwest corner then I could look down and see the other stake which would be the northwest corner of the Emma. I never took a view on corner No. 3 and 4. I have not made any measurement of the claim myself since the box was erected containing the plat of the official survey 2360. I have had possession of the claim ever since 1889 until about two years ago. I have worked on the different claims. I have not got — buildings on No. 2. We have done some work on
95 the surface ground there since 1889. I done work there in 1890. Other work was done about two years ago this last summer. Somebody worked there, the old original discovery was a little work done on it and also over the line, I think it is very close to No. 2 west end line, there was a little work done there. I think a man by the name of Smith did that work. I did the work myself in 1890. 1906 and 1890 is the only time I worked on the surface there. In 1890 I think I drove in about 25 or 30 feet, it was west from the original discovery of No. 2, very close to the end line. I tunneled under probably four or five by six and one-half, six feet high and four feet wide, between 25 and 35 feet long. This work has fallen in. There are not many brushes around there.

Q. This work you were doing on Independence No. 2 through the tunnels of the old Independence, was done consecutively from the year 1889 down to the present time?

A. We had done some work on tunnel No. 2, we had crossed the line of the Independence and on to No. 2.

Q. A good deal of that work that was done there was running through the Giant claim, was it not?

A. I think No. 4 which swings to the south that is cropping out the lead, I think we are touching on the Giant. I could not tell you exactly how long tunnel No. 4 is; Anderson made an
96 underground survey but it has been extended since, been extended right along; he left that tunnel at about 900 feet. A good deal of this work was done on cross-cut tunnels, the cross-cut tunnels were not mostly drove on the ledge. I have not got 400 or 500 feet in there that is not driven on the ledge, there is 130 feet; I had a cross-cut in the No. 4 and struck my ledge and from there on we practically followed the ledge the whole way. When I testified to having done at least $100.00 worth of assessment work on the Independence No. 2, I was including all the work done on these tunnels as assessment work on No. 2. The stake marked 3x3 being on the north line of the Independence is not the stake that was the original stake of the Independence No. 2 when it was located.

Q. Now, Mr. Swanson, I call your attention to the markings on this map marked stake 3 by 3 being on the north line of the Independence No. 2, and ask you if it is not a fact that that stake was the original corner stake of the Independence No. 2 when it was located right there?

COURT: Which way?
REEVES: East.

A. We claim 100——

Q. Answer my question, please. The question is, if you follow from that place marked there—marked stake, being on the north line—north side-line of the Independence No. 2, if you should follow along that line east it would bring you out the proper place a distance of 1500 feet, it would bring you out practically as the claim was originally located or staked?

97 A. That stake has no connection with any particular corners.

COURT: Answer the question he asked you.

A. Well, yes; take it from this point to here, the corner would be there, would it not?

Q. Yes sir; you find that to be the case?

A. Yes sir.

Q. Then if you should run that line down in a southerly direction until you came to your south side line and follow the south side line out a distance of 100 feet, it would bring you out at practically the point where your other east stake was set originally?

A. Yes. If I should run that line down in a southerly direction until I came to the south side line, and follow the side line out a distance of 1500 feet, it would bring me out at practically the point where my other east stake was set originally. I never saw that stake but once; I saw it in the fall of 1906; it was a very low stake;

it looked aged. I don't know nothing about Mr. Allen putting some stakes down on those lines. Mr. Anderson set stakes in places of some he found there. I saw them when he found them. I showed him those stakes as being my corners. The stakes I showed him were not new stakes. The old stakes had been up there for years, they were round fir stakes faced on four sides. The stakes had probably been there four or five years. I am positive I didn't put them there in 1906. I didn't go with Mrs. Kettler, Mr. John Sullivan and Mr. A. J. Sullivan and Will Sullivan in 1904 to
98 make a re-location of the old Emma No. 2 ground as the Malta No. 1 and point out to them the corners.

Redirect examination:

Q. You have testified in a question by Mr. Reeves that the east end line of the original Independence as staked prior to January 3, 1889, was flush with the Emma west side line on the old original Emma. I will ask you to state what you mean by that: particularly with references to whether or not the old original Emma line extended as far south as what is now the south boundary line of the Independence No. 2?

A. It would be probably 125 or 130 feet from this centre line of the Independence No. 2. That would be the southwest corner of the Emma. I never had anything to do with placing the box; I was not in the state when that box was placed there. The west side line was run a little bit north of east to the east side line of the original Emma. The first time I ever saw corner No. 4 of Malta No. 1 was in June, 1907. Mr. Smith didn't do any work for me, he did it for the present company that is in charge. I have four main tunnels all told from the surface in. The hill on the Independence rises from the No. 1 tunnel and also from all the tunnels, pass—No. 1 tunnel is the first one we run. The first one above. We dropped down here very close to 100 feet perpendicular and started another one, we dropped down another one; we dropped No. 3 down and we *carched* about the same amount of ground
99 probably 100 feet perpendicular and then No. 4 tunnel we dug down 115 feet perpendicular on this. The saddle is pretty near due east and west. The Independence No. 1 is located on this hill. The ledge in the Independence No. 1 and 2 runs pretty near due east and west. The work which I have done has been on this ledge; 265 feet of tunnel in No. 1; 575 in No. 2; 600 feet in No. 3 and about 1400 or 1500 feet in No. 4. The dip of the vein is to the south, it will average from horizontal probably 40 degrees. The No. 2 tunnel extends into Independence No. 2 claim. No. 1 tunnel extends 85 or 90 feet to the east end line of the Independence, the east end line of No. 1. No. 3 tunnel extends onto No. 2 35 or 40 feet, I mean No. 2. No. 3 extends into the Silver Bullion, south of Independence No. 2. No. 4 tunnel extends into Silver Bullion No. 2. The Little Giant lies south of the Independence No. 1; it is a fraction, she has 600 feet on the west end and probably not over 75 feet wide. I have spent 20 years or over in the development of this group of claims. The work has been done

principally in these tunnels. I have lived during that time in the building I have; the first ten years we had the building on the level with tunnel No. 1; later we moved down to the level, a little above the level of No. 4; since 1895 we have lived there. I made the contract with the Independence Mining Co. in June, 1906. They have probably done $25,000 or $30,000 worth of work. Each
100 year since 1906 they have expended more than $800.00 each year on this group of claims. Besides my own work performed prior to the time I delivered possession to the Independence Mining Co., I have employed men to help.

Recross-examination:

When I say we, I mean my family, my wife. I am a married man. I was married in Colorado. When I said the assessment work as having been done, I meant Independence Group. I am the owner of the original Independence; I bought an interest in it in 1883. I have ascertained that that is a valid mining claim, and was such in 1883. Smith was foreman of the property at the time and I seen him up there; I also see him with other men doing this work. Part of this tunnel run on the Silver Bullion. I never heard of the Pride of the West before. Never knew that anybody else claimed the Silver Bullion. Silver Bullion was located *in* July 26, 1883. I also owned one called the Silver Bullion No. 2, that was located in 1889.

Q. I call your attention to this shown on the map in evidence and being in the vicinity of the corner marked land 4, that being the southeast corner of Independence No. 2?

A. Yes. The first time I saw that monument was in July, 1906. There was no stake there.

Q. I call your attention to the one marked stake about midway on the south line of the Independence No. 2 and being
101 marked stake on this map, and probably a couple hundred feet north, of the south side line of the Independence No. 2, that you designated to Bowen in your testimony before supper as the southeast corner stake of the old Emma claim, did you not?

A. I did not. This corner we are referring to—to this corner here, the southwest corner, the southwest side line of the Emma, that is the one, never got to that corner at all. Didn't say anything in my testimony before supper about the southeast corner at all. I never said anything about the ridge. I know where the southwest corner stake of the official survey is located on the claim. On the 3rd day of January, 1889, I was the owner of the Independence claim, and I knew there was a discovery made on the old Independence. It is 100 feet from the west line of the Independence No. 2 to the discovery of the Independence No. 2. It is not 142 feet. The largest cut is on the Independence. Where the post on the map of the official survey is located, is pretty close to the line. The box is located about 110 feet east of that cut, the discovery cut of the Independence. I did not measure it. I only seen it once, about four or five days ago. I don't think the box is closer to the big cut than the others. There are two smaller cuts east of this larger

one and that would certainly bring the box closer to those smaller holes. The place I designated on the map as being the southwest corner of the old Emma, there is no stake there now. I have never seen any stakes there for 10 or 12 years.

102 Redirect examination:

I didn't pay much attention to the box when I was up there, I merely opened the box and looked at the plat and I took a view of the surroundings and I know it must be right on the line or probably a little east of this end line. I was co-owner of the Independence group in 1889. I bought Warren's interest out in 1895, then I bought Anderson's interest in 19—. The Independence No. 2 has been a part of the group.

(BOWEN:) We desire this document which purports to be a copy of protest and adverse claim be marked for identification as plaintiff's Exhibit C. This document which purports to be a copy of power of attorney we desire be marked plaintiff's Exhibit O. We offer those in evidence under the following

*Stipulation.*

It is stipulated that on February 29, 1908, which date was in the period of publication of Malta No. 1 application for patent, Charles Swanson, by Harry J. Allen, his attorney in fact, filed a protest and adverse claim with the Register and Receiver of the United States Land Office at Hailey, Idaho, and it is admitted that Exhibit C is a true and correct copy of the same, and that plaintiff's Exhibit D is a true and correct copy of the power of attorney mentioned therein and filed and annexed thereto; and that there are annexed to such protest and adverse claim correct copies, certified to
103 be correct by the County Recorder of Blaine county, of a deed from R. R. Warren to Charles Swanson, found in Book 47, page 6, Records of Alturas county (now Blaine), and a deed from Erik Anderson to Charles Swanson found in Book 49, page 297, Records of Blaine county, and a location notice of the verification found in Book 22, Quartz Claim Records of Alturas (now Blaine) county, at page 101, all of which have been introduced in evidence herein, and also had annexed thereto a copy of the plat introduced in evidence herein as plaintiff's Exhibit B, and it is stipulated that the manner of making this proof is waived. They desire to make some objection as to some phases of it.

(SULLIVAN:) We desire to enter our objection.

(BOWEN:) I offer them under that stipulation; if they agree to that stipulation then the Court will consider it subject to the objection they make.

(SULLIVAN:) We don't object to the admissibility of those papers but wish it understood we do not admit the truth of the matters stated in any of the exhibits.

(BOWEN:) They waive the question as to the manner of proof

going in to save the necessity of the records of the land office coming here. We offer them in evidence under the stipulation.

(COURT:) It may be admitted.

Whereupon plaintiff rests.

104 *Defendants' Opening Statement.*

Sullivan makes opening statement of case on behalf of defendants.

*Testimony of Joseph Heller.*

JOSEPH HELLER called and sworn on behalf of defendants testified as follows:

I live in Hailey, Idaho; have lived in Idaho off and on since 1881. I was in this vicinity in 1881. I was prospecting. I have been mining and teaming some. I prospected the summer 1881. I am acquainted with what is called the Independence group of mines, the Emma No. 1 and the Emma No. 2, in the Independence gulch. I became acquainted with that claim I think in 1881. I located the Emma No. 1. It is the northern claim. Mr. Sears located No. 2. I was there when the claim was located No. 2. It was located the 21st day of June 1881. Me and Mr. Sears marked the boundaries. We found mineral on the Emma No. 2, where we made the discovery. The character of the ground on the Emma No. 2 was shale. There were no outcroppings where we made the discovery. We went to cutting here, I found float and I traced it up from the cutting there, probably cut about 20 feet in length and found this ore and we run it probably 50 or 60 feet that summer. We had some of the ore assayed. Came down to Bellevue and had it assayed; it went from 80 to 120 ounces in silver. I think anybody
105 would locate the Emma No. 2 ground. The discovery of the Emma No. 2 was put right ahead of our cut, right in the top of the ledge where we took out the ore. We put it as near as we could on the center lines No. 1 and 2. It was a large cut 10 or 12 feet. I did not put up a discovery stake at the Emma No. 2. We put up a monument of rock probably two or three feet on the bottom. We put a box with a notice in the monument. A notice of location of No. 1 and No. 2.

(SULLIVAN:) At this time we wish to offer in evidence page 615, Book 7 of Quartz Claims showing location notice of the Emma No. 2.

(BOWEN:) To which the plaintiff objects for the reason that it does not appear from the testimony so far that the defendants are in any way interested or connected with the claim through which they claim title to the portion in conflict with the Emma No. 2; and for the further reason that the location is not described so as to tie the claim to any permanent monument or any object sufficient to identify the claim from the letter of the location itself.

[Objection over-ruled.]

[Exception.]

I put a copy of the location of the Emma No. 2 which was afterwards recorded in the Recorder's office of Alturas county. Me and Mr. Sears staked the Emma No. 2. We put up a stake at each corner and the centre end stakes. They were driven in the ground. We put them in so they would stand up. They were all four feet, four inches in diameter. We described each corner on the stake,
106 also the name of the claim; we marked that upon all the posts; I cannot recollect whether I marked it on the outside or inside of the claim. We marked the boundaries at the same time we made the discovery. We worked there after that long enough to drive about 65 feet. John Sears was with me at that time. We were up there quite a while in 1881, and the next time I was up there was in June, 1882. John Sears was with me then. John Sears did the assessment work that year on the Emma No. 2. Did $500.00 worth of work, ran 400 feet of tunnel. We stayed up there in 1883. I think we did $100.00 worth of work in 1883. I was up there in 1888 to work. I don't know who done the assessment work that year on the Emma No. 2; I worked there and taken a lease and bond on it, me and Mr. Tucker, and we sent up a man by the name of Robt. Knight, and I struck ore there and had a chance to sell and came down to see Tucker and he didn't sell and so I sold out to him. I could not say how much work we did in 1888. I had worked there several places before I struck the ore, and then ran in tunnel about 75 feet and raised. I did over $100.00 worth of work that year and then sold out to Tucker.

Q. Did you make a deed at the time to Mr. Tucker?

A. Yes sir, I did.

Q. Who drew the deed?

(BOWEN:) Object to the introduction of any evidence in relation to any deed from this witness to Tucker as irrelevant and
107 immaterial to any issues in this case. It would not make any difference who owned the Emma No. 2, taking their statement that they intended to show that the Emma No. 2 was a valid location in 1889 when the Independence No. 2 was located; don't make any difference who owned it; the question is whether it is valid location.

[Objection overruled.]

[Exception.]

(SULLIVAN:)

Q. Who drew the deed?

(BOWEN:) Object to for the further reason that it is not the best evidence.

(COURT:) First show whether you have a deed.

(SULLIVAN:) We have not the deed; we expect to show by this witness the loss of the deed.

(COURT:) He may answer.

[Exception.]

A. I don't remember who drew the deed, either Ensign or Bruner. I conveyed all my interest in the Emma No. 2. The deed was ac-

knowledged by me. I gave the deed to Tucker. The consideration was $300.00. The money was paid to me; we were there in Wertheimer's store. After 1884 I was upon the ground in 1891. Did work on the Emma No. 2; Mr. Havery took a lease——

(BOWEN:) Object to the introduction of any evidence relating to the doing of any work subsequent to the year 1889 on the Emma No. 2, for the reason that it is immaterial, not proving or disproving any issues in this case and not tending to prove that the work
108 was done for the Emma No. 2 in 1888, and year previous to the location of the Independence No. 2 by Charles Swanson and his predecessors.

(SULLIVAN:) We have pleaded an estoppel in this case. Now we expect to show by this witness that the work was continued right along during all of these years and that Swanson was there and knew they did the work, that is one of our defense- that we have set up.

(COURT:) That Mr. Swanson is estopped from denying your title to the claim?

(SULLIVAN:) Yes sir; he stood by and suffered them to work, that is one of our separate defenses that we expect to prove.

(BOWEN:) Object to it for the further reason that there is no pleading in the case raising the question of estoppel as to work having been done on Emma No. 2 and for the further reason they are not claiming an estoppel on Emma No. 2, but claim an estoppel on Malta No. 1 which occurred in 1904.

(COURT:) I shall admit the testimony, and the legal effect of it we will argue at the termination of the testimony.

[Exception.]

We dug a tunnel up there in 1890. I don't know whether Emma No. 2 or Emma No. 1; me and Mr. Havery took a lease and we worked up there. We worked north of the house that year. On the Emma No. 1, the north claim. Work can be done on one claim provided it tends to develop several. We could run tunnels
109 to develop No. 2, and develop if the ore came that way. We didn't find any ore there. From that tunnel we could have drifted south into the Emma No. 2. I could not say just how much work we did at that time. Havery didn't like to work in it and I done the work there and we packed near all the timber and lagging. Havery worked about three or four months there that year.

Q. Did you do enough work to cover the assessment work of $100.00 on the Emma No. 2?

A. I know we did more than that; I was there in 1890 and 1891; that is what I am talking about I could not say what month we went up; I could not say what month we stopped or quit.

(BOWEN:) Object to what occurred in 1891 for the same reasons.

[Same ruling.]

[Exception.]

A. We went in the fall and stayed till spring.

Q. Did you do enough work in 1891 to cover $100.00 worth of assessment work on Emma No. 2?

A. Yes; we did more than $100 00 worth of work, a good deal more. Tucker was there; I did work on the Emma No. 2 in 1894; Sam Tucker was with me then; I did at least $100.00 worth of work then. I don't know whether I did $100.00 worth of work on the Emma No. 2 in 1895 or not; it was on No. 1. We run several hundred feet on No. 1. I suppose we did over $100.00 worth of
110 work there that could be applied on No. 2, yes. We run back into the hill there. We run pretty well south. Never was there any more, that was the last time. I was there a few days ago. I could not say the first time I ever saw Swanson. I saw Mr. Anderson in the fall of 1880—1883. Me and Mr. Emery went up there to do some work and worked several days and Mr. Anderson came up and had a talk with us and was talking about the strike and etc. and told me he had bought in. That was the first time I saw him. I says "we have got a claim here, you have staked over our ground." He says "why it would not make any difference because it was the first location in the gulch, whether putting it back or not." I said I rather he would; he said he would. He staked over on the Emma No. 2. I could not say how far over the west side line those stakes were, probably 100 or 150 feet. I don't know what Anderson did after I had this conversation with him; we went to work there and never thought any more about it. It is so long ago I don't know whether he moved them right back at that time or when he did. The next time the stakes were moved back adjoining almost on the Emma, moved back to the side line on the Independence No. 2. They were flush with the west side line of the Emma No. 2, right along the line as near as I can recollect. I do not know how long they remained there. I knew the boundaries of Emma No. 2, I helped stake them. About three or four days ago I saw where the
111 stakes of the Malta No. 1 were. The northern stakes of the Malta No. 1 *as* in the same position as the old stakes of the Emma No. 2. They looked like the same stakes as near as I could tell. While I was there in 1890-1891, I did not see any stakes of the Independence No. 2 lode.

Q. Did you see Swanson when you were doing the work there in 1890 and 1891?

A. Yes sir.

Q. Was he there at that time?

A. Yes; I was at his house every now and then.

Q. Did he know you were working over on the Emma?

(BOWEN:) Objected to as immaterial and not proving or tending to prove any issue in the case for the reason it would not tend to prove or disprove the validity of the location of the Independence No. 2 made in 1888, or tend to prove or disprove the fact that the conflicting area was then subject to location at that time. It would not tend to prove that the Malta No. 1 was a valid location made in 1904, it would not tend to prove any of the facts alleged in their alleged estoppel as set forth in the second defense to the complaint.

[Overruled.]

[Exception taken.]

(SULLIVAN:)

Q. Did Mr. Swanson, at any time you were there, point out any stakes of the Independence No. 2?

(BOWEN:) Objected to for the further reason—for the same reason as the previous.

112 (COURT:) He didn't answer your first question.

(SULLIVAN:)

Q. Did Mr. Swanson show you or notify you of any posts on the Independence No. 2?

(BOWEN:) I renew the objection.
[Overruled.]
[Exception.]

A. No sir.

(SULLIVAN:)

Q. Did he make any claim whatever to the lower half of the Emma No. 2?

[Same objection.]

(SULLIVAN:)

Q. I will ask you as to the southern half of the Malta No. 1?

(BOWEN:) Objected to for the reason stated in the previous objection and for the further reason it is a leading question.
[Sustained.]

(SULLIVAN:)

Q. State what conversation, if any, you had with Mr. Swanson during 1890 as to the Emma No. 2, if any?

(BOWEN:) Same objection as the previous question.
[Overruled.]
[Exception.]

(SULLIVAN:)

Q. I will ask you if Swanson during any time you were there in the nineties had any talk with you in regard to his claiming any portion of the old Emma No. 2?

A. None whatever.

Q. I hand you this map that has been introduced in evidence and point to the places marked cuts near the western end line
113 of the Independence No. 2, and ask you who did that work, if you know?

A. There are two cuts there that I have run.

Q. State whether or not at any time you were there you saw Mr. Swanson or any of the Independence parties doing any work there on the Emma No. 2. Did you ever see Swanson or any one for him?

A. No sir; never did.

(BOWEN:) We desire to object to the introduction of any testi-

mony, and all introduced I move to strike out, relating to the doing of assessment work and other work upon the alleged Emma No. 2 location during the years 1890 and 1891—1890 to 1894 or any time prior to 1888 for the reason that is immaterial, irrelevant and incompetent, not tending to prove or disprove any issues in the case, and for the reason that the said evidence could not prove or disprove the validity of the Independence location made in 1889, or prove or tend to prove whether or not the conflicting area was open for location at the time the Independence No. 2 location was made in 1889, or prove or tend to prove that Malta No. 1 location was a valid location made in 1904, and for the reason that no acts of estoppel for work done on said claim between 1888 and 1904 is pleaded as set forth in the answer.

(COURT:) I shall leave it in the record and leave the matter for further consideration upon consideration of the entire case. I shall deny and overrule the motion now.

114 [Exception.]

I located the Emma No. 1, the northern claim. Those claims were operated and worked together. I am a citizen of the United States. I was born in Milwaukee, Wisconsin, in the year 1848. Thousands of feet of work has been done on the Emma No. 1 and Emma No. 2 since they have been located, and probably $8000.00 to $10,000.00 has been expended in assessment work. That includes the time I was there. I have examined a good deal of the workings since. The work is caved in in 1881. I cannot tell which has the largest portion of work No. 1 or No. 2; I suppose it is about even as near as I could judge. The North Star mine was about a mile south of the Emma No. 1 and Emma No. 2. It was the largest mine up in that country, and it was a well known mine. No contiguous claims around the Emma at that time. The rock we found on the Emma might bear everything, but it was lead and silver.

Q. I will hand you the plat introduced in evidence by the plaintiff, and ask you if you know where the corners of the official survey 2337 of the Malta No. 1 are, the stakes?

A. Yes sir.

Q. Have you seen the new stakes?

A. Yes sir.

Q. I will ask you about where those new stakes are with reference to the corner stakes of the old No. 2?

A. About the same, probably 10 or 15 feet.

Q. You say they were about the same?

115 A. Yes sir.

Q. When you were up there within the last few days did you see the box containing the survey or plat of the survey of the Independence No. 2 in the application for patent?

A. Yes sir.

Q. Where did you see that?

(BOWEN:) Objected to as immaterial to the issues in this case.

(COURT:) He may answer.

[Exception.]

Q. Did you see such a box?

A. Yes sir. I could not just say how many feet the box was from the discovery of the old Independence. It was about 30 feet west of the east end line of the Independence. I can't tell how far it was from the old Independence east line. I made a couple of cuts near the west side line.

Q. Of the Malta No. 1, where are there any cuts between those cuts and the east end line of the Independence?

A. There are two cuts I have run and two cuts Swanson run and the line is between them cuts.

Q. Here is the Independence No. 2; here is the east end line of the Independence; here is the Emma; here are the cuts in here that you dug?

A. Yes sir.

Q. Now I want to know if there are any cuts between those cuts and the east line of the Independence?

116 A. No sir.

Q. Are there any depressions of any kind showing that there were any tunnels or cuts of any kind within the 142 feet?

A. Not that I saw. I was up there two or three times last week.

Q. If there had been any discovery cut or large cut running in 18 or 20 feet—30 feet would it show there?

A. Yes, I should think it would.

Q. You speak of a couple of other cuts by Swanson; tell us where those cuts are, east or west of the east line of the Independence?

A. There are two cuts.

Q. Where abouts?

A. Two cuts over here.

Q. Now I am asking you over here where were Swanson's cuts; this is the west here?

A. Two over here.

Q. On the east—west of this line of the Independence line was it on Independence ground or not, these two cuts that Swanson made?

A. Certainly.

Q. On the Independence ground. West of the east end line of the Independence?

A. Yes sir. From the cabin you see the west side line of the old Emma, you can see from end to end of it. I don't know nothing about No. 2; we always could see the Emma stakes and the old Independence stakes, the east end line of the Independence.

Q. You could always see those stakes. If there had been

117 any stakes put there for the Independence No. 2, that is the west end line, could you have seen them from the cabin?

A. I suppose so, yes, if they were put up there where you say, you could see the Emma line all the time and the Independence line, that is the way we sighted up through to run our cuts.

(COURT:) What years were you there, were you there in 1889?

(SULLIVAN:) He was there before in the eighties.

A. 1891, 1892, 1894 and 1895. I did not have much conversa-

tion with Swanson in the winter of 1890 in regard to the southern portion of the Emma No. 2. I have heard him say once that he would like to have a piece of that ground, that is all the conversation we ever had, that was in 1890. We marked the name of the claim on the stakes we put up on the Emma, put it on all the stakes.

Cross-examination:

He made the remark that we would like to have a piece of the southern part of the Emma. He said he didn't want any wildcats or anything of that kind; he said he wouldn't care anything about any of the wildcats in this country, but he would not mind having a piece of that ground.

Q. You never thought of it until Harvey called your attention to it, I understood you to say he reminded you of it?

A. Yes, he reminded me. I have no interest in this case;
118 I am just a good friend of Swanson as of Mrs. Kettler. I desire to testify in relation to the location of these and every matter to the best of my knowledge. I have no desire to testify positively to matters upon which I am not positive. I did not tell Swanson recently that I did not know positively the location of the east—of the south end line of the Emmo location or the side line of the Emma location; I told him about making a mistake, talking it over in Ketchum, about the Malta being Malta No. 1. I am as positive of the south line as the north line of the Emma. I was in the Warm Springs District when the Emma No. 1 was located in 1881, and stayed in this country until 1884 and then went away. I came back the next spring. From 1884 until 1890 I was not on this property. I was there in 1890 and 1891, not in 1892; I have been up there twice since 1891; I done the assessment work in 1894 and 1895. I could not say how many times I have been on the ground since 1895. I was on it three years ago, worked for Swanson on the Independence and walked across the Emma ground. I have not had any interest in the matter at all since 1895.

Q. I would like you to describe the physical conditions—surface condition existing where these claims were. I will ask you if it is not true that the Independence Gulch goes in almost easterly and westerly direction, that is, the main gulch, the gulch part?

A. Yes sir.

Q. And on the right hand side as you go east, or the
119 southerly side, would be what is known as the divide between the Independence Gulch and the other gulch lying south, the Courier Gulch, is that right?

A. It does certainly make a circle, comes up here—divide runs up here and comes around.

Q. As you go east along this gulch the Independence properties lie on the rise or divide to the east?

A. To the south, yes.

Q. This gulch as you go east rises very precipitously, it is very steep, is it not?

A. Yes sir.

Q. As you get further east—as you get along toward the head of the gulch where the Emma location are, there are sort of mountains that kind a shuts off the head of the gulch; the gulch rises to the top of the mountains?

A. Yes, certainly.

Q. The Independence claims, the old Independence lies to the south as you go up the main gulch and the Independence No. 2 lies further east and adjoining the Independence No. 1, would still be on the main divide, would it not?

A. Yes sir.

Q. Now the Emma and the Malta, the old Emma location of which you speak, were on the side of this hill as you rise up—goes up from the head of the gulch and running north and south, were they not?

A. Yes sir.

Q. In other words, the Independence claims were on sort of a divide lying to the south of the Emma claims or the southeast
120 of the Emma claims—southwest of the Emma claims, and the Emma claims were lying north and south on the side of this mountain which rises from the head of the gulch; that is true, is it not?

A. Yes.

Q. Can you see the map so as to be able to testify from the map, this is supposed to be the north, this represents the Malta?

A. Yes.

Q. The Emma is not shown on that?

A. Yes.

Q. This represents the Independance?

A. Yes.

Q. This being the ridge, markings here indicating the ridge. Now the work you spoke of as having been done in the year 1881 when you made the discovery, and from then on until the time you transferred these claims to Mr. Tucker, where was it done, with reference to that map?

A. Here, on the line.

Q. This line here represents—the marking here 2 and 3 represents the line between—it is northerly—the north end line of the Malta No. 1 lode?

A. Yes.

Q. Between 2 and 3?

A. Yes.

Q. We find here a cut marked No. 1—discovery cut 5 by 10 by 15, I will ask you if that is where you made the discovery or where the discovery was made for the Emma No. 2, to which you have testified to?

A. It was made right on the line between the two claims,
121 between the No. 1 and No. 2. The No. 1 laid north and the No. 2 south.

Q. If this line 2 and 3 was the boundary line between the Emmas your discovery cut was made somewhere near the line?

A. Right on the line. It was run right east, square into the

mountain which lies south of my place. The work done in 1884 and 1883 was done right on the line. The tunnel which was driven in 1881, 1882 and 1883 was run right on the line; the tunnel ran east.

Q. Did you work on any more than one tunnel in 1883 and 1884?

A. Yes sir.

Q. How many tunnels did you work in?

A. We run another one right down to the house.

Q. Which direction did you run that tunnel?

A. The south side of the claim; Mr. Swanson knows himself.

Q. I am not talking about these cuts.

Q. Where did you run your other tunnels in 1881, 1882 and 1883?

A. Right over there close to Swanson's cut, cut the tunnel, I couldn't say, 15 or 20 feet.

Q. Those cuts which you are speaking about now are the cuts which you made learning that the Independence had made a strike?

A. Yes; went up there.

Q. After the Independence made the strike on their ground in 1883 or 1884, somewhere along there?

122 A. In 1883, I think.

Q. That strike was made somewhere on the old Independence lode?

A. That is all I know anything about, the old Independence.

Q. Then you went as close to your side line as you could run and run two tunnels?

A. No sir, I don't know as I did, as close as I wanted to go; Mr. Swanson had run two on the other side.

Q. Swanson had run two in what direction from you?

A. West.

Q. West of you. How far west of you had Swanson run these two tunnels?

A. No tunnels, they were cuts.

Q. Well, cuts then?

A. I could not say, perhaps 100 feet.

Q. Only approximate, that is your best judgment?

A. Yes sir.

Q. Those two cuts which you made in 1884, how large cuts were they, in 1883 at that time?

A. They were large cuts.

Q. Were they tunnels or cuts?

A. Drove, I tell you, two cuts, and then I went underneath and drove a tunnel. Swanson was there himself.

Q. You drove a tunnel besides two cuts?

A. Yes sir.

Q. On the side line of the Emma further south than where the original Independence was?

123 A. Yes sir.

Q. How large were those cuts, could you tell how far you cut into the side of the hill?

A. I never measured them; there are two large cuts.
Q. Give an idea, how far did you cut in, 10 or 15 feet?
A. Yes.
Q. 10 feet?
A. I don't know, it might be 10 feet, and at the end of that cut I ran a tunnel in.
Q. Where did you run the tunnel, with reference to the two cuts?
A. Right in this one cut, the cut is all that shows now, two cuts, they are filled, but they are large cuts right now.
Q. You made two cuts and in one of those cuts?
A. The lower cut.
Q. You run a tunnel, how far did you run that tunnel?
A. I say it is so long ago, probably 15 feet.
Q. You abandoned them, you didn't do any more work, you didn't find any ore or ledge matter?
A. Yes, we found the ledge, the ledge is in there. I found a little on top of where I ran the tunnel.
Q. Did you find any paying quantities?
A. No sir.
Q. Just a small amount of mineral rock?
A. Mineral—galena.
Q. Found some galena?
124 A. Yes sir.
Q. Very small quantities?
A. Very small strike.
Q. How long did it take you to run those tunnels and cuts, you speak of?
A. I could not say, while we were up there, two of us.
Q. Do you remember about how long?
A. No sir, I do not.
Q. Could not remember whether you were working a week or two?
A. We worked a week and more too.
Q. Two weeks?
A. No, I don't know as we did.
Q. Between one and two weeks?
A. Yes, I think so. During the years 1881, 1882, 1883 and 1884 I ran more tunnels than those I have testified to. Those two cuts and the tunnel near the Emma side line on No. 2 ran south, that is along the course of my claim.
Q. I find a tunnel here marked on this map 4 by 5 which runs in a northerly direction 89 degrees east 125 feet. This tunnel being north 27 degrees east 320 feet from corner No. 3 of Malta No. 1 claim in survey for patent. I will ask you if that is the tunnel you ran in 1883 and 1884—1881, 1882, 1883 and 1884, prior to the time you sold to Tucker, outside of the ones you testified to as having run on the end line?
A. I have not worked any more in the tunnel, the first tunnel that I ran there in 1881, 1882 and 1883 you speak of, no more. That is supposed to be on the line; in 1884 I took the lease on
125 the claim again and run in on No. 1 tunnel. In 1881, 1882 and 1883 I run a tunnel in an easterly direction along the

line between No. 1 and 2. I ran the tunnel at that time 400 feet. Some of the work was done after I sold to Tucker. The next tunnel I worked on was north 200 or 300 feet of the Emma No. 1 ground; I ran that tunnel east about 75 feet and then raised; the next ran different places south of the house in claim No. 2 about 20 or 30 feet from the north end line of No. 2. They were short tunnels; after that I worked in there north of that again; we started east and then turned and tried to get under the ledge and run north. This work that I speak of was all done prior to the time I sold to Tucker. Next I ran a tunnel on No. 1 Emma again, just a small cut in there, it was run east perhaps a little south of east. That is all I done prior to the time I transferred to Tucker. I sold to Tucker in 1884. I went away and came back in 1885. I did not do any work in 1885. The next work I did was in 1890; I went and took a lease from Tucker. I went up there in the fall and stayed until spring in both years. Went up in the fall of 1890 and worked until the spring of 1891. worked on No. 1 during that time, about 200 or 300 feet from the north end line of No. – claim. Did work in 1894 and 1895. This was under a lease from Tucker. Went there in the fall of 1894 and worked until the spring of 1895. That was a little east of the work I had done in 1890 and 1891 in claim No.
1. Have done no work since 1895 on these claims. With
126 the exception of two small tunnels, the tunnel and the cut which I ran in 1883, which took me between one and two weeks to run, all the work I have testified to has been done either on the claim north of Emma No. 2 or on the line between Emma No. 2 and the Emma No. 1 or within 25 or 30 feet of the northerly end line of the Emma No. 2, and all the work which I did in 1890, 1891 and 1894 and 1895 was done on the Emma No. 1 claim. I was looking for a north and south ledge. We never traced the north and south ledge. I was not any prospector or miner. I suppose the ledges in that country run east and west. We found ore there but could not tell anything about it which way it run. I took out ore in 1881 when I made the discovery. I took that out on the line between No. 2 and No. 1. I took between a ton and a half and two tons of ore out. I could not say that it was a well defined ledge, but we supposed it was the ledge. We could have traced the ore further if we had known better. We were drifting for it in the wrong direction; the next year we came and traced it. Took out more ore from that place. I could not say how much ore I took out; we gophered around you might say; we ran probably 50, 60 or 75 feet on our hands and knees just following that up. We came down and we drove it across and found ore there. All the ore that I found on the Independence or in the Emma No. 2 within the boundaries of
the Emma No. 2. We found the ore all through there by
127 drifting next year, 1882, we drifted then south and run a winze. We drifted probably 35 or 40 feet. The location of the Emma No. 2 was made by myself. John Sears and I went together and located both of the claims. It was located in the name of John Sears and S. M. Tucker. I assisted in the putting up of the stakes on the Emma No. 2. I did nothing subsequently to the

time after these stakes were placed up with reference to keeping up the stakes on Emma No. 2.

Q. It was in the year 1883 you say you called the attention of Erik Anderson that the stakes of the Independence were over on the Emma?

A. Yes sir.

Q. As to the distance you thought they were over on the Emma, that is only approximate?

A. All guess work.

Q. Guess work as to how far it was?

A. Yes sir.

Q. And the only thing is, as you recollect it, that they were over your line?

A. Yes sir.

Q. You say you called Erik Anderson's attention to that in 1883?

A. Yes sir.

Q. Was that before or after the running of those cuts on the north side line?

A. That was just——

Q. West side line, beg pardon, that was just at that time?

A. Yes sir.

128 Q. Those other cuts you speak of as being west of that, were they made prior to the time you called his attention at that time?

A. They were there, yes.

Q. Were they there at that time?

A. Yes, Mr. Anderson told me they were on them.

Q. What distance was there between those cuts and the cuts you made?

A. 100 or 120 some odd feet, the line ran between them cuts; I had two cuts and this tunnel.

Q. The line ran between?

A. Yes.

Q. You say, as I understand, you notified Anderson and the next you observed of those stakes was in 1884?

A. Yes sir.

Q. And that they were on the line at that time?

A. Yes sir.

Q. The line is between those two sets of cuts of which you speak?

A. Yes sir; stakes all along on the line, Independence stakes.

Q. The Independence stakes were flush with the Emma stakes at that time. Did you drive any cuts prior to 1883 or prior to 1884 when you sold to Mr. Tucker, on that Independence ledge, on the land of which you are talking that they lay east of the cuts which you made?

A. Was there any cuts east of the cuts I made?

129 Q. Yes, at that time.

A. Yes.

Q. Further east?

A. Yes, a long ways.

Q. How far east?

A. Perhaps 150 or 200 feet, I could not say which.
Q. Who made those?
A. I made it and John Sears; made it in 1881; I am not sure whether two cuts or one and we started to drive in a tunnel.
Q. What claim is this you are speaking of now?
A. No. 2.
Q. How far was that from the northerly end line of Emma No. 2?
A. It is close to the south line—south end.
Q. Close to the south end line?
A. Yes sir.
Q. As I understand the testimony, where the official survey of the Malta No. 1 lode is, represents practically where the Emma No. 2 lies?
A. Yes sir.
Q. Now as I recollect your testimony, it was that in 1883?
A. Yes.
Q. After the Independence had discovered some ore, that you drove those cuts?
A. Yes.
Q. Or cut and tunnel?
A. Yes.

130 Q. Near the side line of the Emma towards the south end of the claim towards the south end of the Emma, or in other words, east of the Independence?

A. Yes, certainly, east.
Q. As I understood, with the exception of those two cuts, you never did any work east of the old Independence?
A. Only in 1881.
Q. Where were those cuts?
A. Still east of that.
Q. How far east?
A. Probably 150 or 200 feet, I could not say.
Q. Still further east?
A. Still further east.
Q. You drove your cuts east of the Independence?
A. Tunnel and cut about there.
Q. How many cuts did you drive prior to 1884 east of the Independence?
A. That is all the cuts I done over there in 1881, and in 1883 when the Independence struck I done them other two cuts. Those cuts I drove in 1881 east of the Independence were very large cuts; we run our cut southeast about 10 or 12 feet into the mountain. There was ore there.
Q. Was that before or after you made the discovery on the north end line of the Emma No. 2?
A. East and south.
Q. South end line?
A. Yes.

131 (BRODHEAD:) I don't think the witness understands the question.

A. Close to the south end line.
Q. Where you made the discovery?
A. No, we didn't make any discovery there.
Q. Didn't make any discovery?
A. We didn't make any discovery.
Q. In this cut you speak of?
A. No sir, it is away to the south of No. 2.
Q. Then this cut you say was south of the south end line of the Emma No. 2, that you are speaking about?
A. It is close to the south end line, yes.
Q. Of the Emma No. 2?
A. Yes.
Q. That was made in 1881?
A. Yes sir.
Q. What direction would that be from those other two cuts which you made in 1883?
A. East.
Q. Pretty near due east?
A. Yes, as near as I could tell.
Q. How far north from the ridge was this cut which you drove in 1881?
A. North from the ridge?
Q. Yes.
A. Probably 150 feet.
Q. Down the slope?
A. Down the slope north, might be further; I could not say.
Q. With the exception of that cut which you speak of, there are no cuts lying east of the two cuts which you made in 1883?
132 A. None that I have done or know of.
Q. Your cuts are furtherest east?
A. Yes sir.
Q. Swanson's cuts that he made laid some 125 feet——
A. He made two cuts west of that besides them two cuts.
Q. How many cuts did you make? You made three cuts towards the south I understand.
A. Yes. The next two cuts west were Swanson's. I saw the stake which is represented as corner No. 4 Malta claim this year, on the southwest corner of Malta No. 1; it was made of quaking asp as near as I could tell. The southwest corner stake I paid no attention to. I didn't examine nothing; I just saw the stakes there.
Q. Those stakes you speak of being used at the north end of the claim, they look like the stakes you put up yourself in 1881?
A. Yes. Every time we walked up there they were there.

Redirect examination:

Q. You made your cuts a little east of the Emma west side line, in here?
A. Yes.
(COURT:) That "in here" business don't go in the record.

(SULLIVAN:)

Q. A little east of the Emma west side line. Then you say Swanson made a couple of other cuts west of yours?

A. Two, west.

133 Q. Were those cuts on Independence ground?

A. Yes.

Q. Then they were west of the east end line of the Independence, were they not?

A. West, yes.

Q. You also stated it might have been 100 or 120 feet?

A. Something like that.

Q. This map shows it is 142 feet from those cuts over to the line. Then if the cuts are west of that line, are they not more than 120 feet apart?

(BOWEN:) Object to that as being an attempt to coach the witness and calling for a conclusion.

[Sustained.]

(SULLIVAN:)

Q. Did you ever measure the distance between those cuts?

A. I did not. He had two cuts there; just before we started we sighted over the top of the stakes over to the end, each end.

Q. Then I will ask you if there are any cuts between your cuts here and the east end line of the Independence claim?

A. No sir.

Q. Within that 142 feet marked there?

A. No sir, not that I know of.

Q. Swanson's cuts are west of that, are they?

A. Yes sir.

(REEVES:)

Q. You have been up to that ground where the Malta No. 1 is now staked out, in the last couple of weeks?

134 A. Three times.

Q. At the time you were up there did you go to what is now the southwest corner of the Malta No. 1, and see the survey stake of 2337 setting in the ground there?

A. Yes sir.

Q. You examined that stake at that time, didn't you?

A. Yes sir.

Q. Relative to where that stake is set at the present time, the southwest corner of Malta No. 1, where was the southwest corner of the old Emma Claim No. 2?

A. Right close there, within 10 or 15 feet or such a business.

Cross-examination.

(BOWEN:)

Q. You have testified *to* with reference to the location of some cuts that were made by you on the west side line east of the In-

dependence west side line of the Emma No. 2 and east of the end line—east of the end line of the Independence. You have testified, as I understand, that that was made by you in 1883?

A. Yes, two of them.

Q. The first cuts lie east—not east but west of that, in 1883, lie as I recollect, how far east?

A. Cuts of who?

Q. Don't make any difference, who west of that?

A. Not on the Emma ground.

Q. Off the Emma ground?

135 A. On the Independence 100 feet, or more, I could not say.

Q. You are not sure about the distance?

A. I am not.

Q. But you think it would be 100 feet or more?

A. It is more.

Q. Might have been over 200 feet, might it not?

A. I don't think it.

Q. In your estimation, you never measured the distance?

A. I did not.

Q. It is only your best judgment?

A. Yes sir. The cuts were pretty good sized cuts, probably four or five feet wide; they were large cuts but not as large as mine. They run into the mountain probably six or eight feet. There was another small cut west of that I dug myself. I sank a hole there, and when I met Anderson and Popham they told me if I dug a foot or two further I would have struck some ore. They told me that afterwards in 1883. The two cuts which I made in 1883 were good sized cuts, four or five feet wide, and then further west of that there was another cut. The next small cut was east of the two large cuts that I made in 1883.

Q. You have testified it was west, have you not?

A. No sir. I could not go over onto the Independence ground surely.

136 Q. You testified as having made the cut before the Independence was located.

A. Oh, that cut. It was 200 feet or more west of the two cuts I made in 1883. I could see the cut I am testifying to now when I was standing at the cuts I made in 1883. I am sure all the cuts I have testified to were there in 1883 and 1884. I have been up there lately with the view of looking at those cuts and they exist the same now as they did in 1883 except the last one I spoke of. The conversation I had with Erik Anderson occurred right close to those cuts. The Popham Bros. were interested at that time with Mr. Anderson. Anderson told me that they bought in and then I mentioned the fact that I thought the stakes were over on my ground some distance. He did not say anything at that time with reference to going and see somebody else about it. He said "you have got the first location there." He says "it would not amount to nothing no way." I says "I rather see you move them back;" and he said he would.

Q. Are you willing to testify that he did not say at that time that he would consider and talk with those interested in the claim with him?

A. No sir.

Redirect examination:

The two cuts which I made in the southern half of the Emma No. 2 east of the west side line were 400 feet from the south line of the Emma No. 2. At the time I made the discovery
137 I did work on the line between the two Emmas. We run 400 or 500 feet. I did nothing before the discovery but to run a cut.

Recross-examination:

Q. You mentioned something about other claims; there was the Emma No. 2 which lay north—the Emma No. 2 which lay south and then there were 3 and 4 when you were working up there?

A. No sir; I didn't know anything about No. 2 Independence or 3 and 4 Emma. We always considered they were one, the Emma No. 1 and 2. I didn't want anything to do with the others, the No. 3 and 4. My lease only covered the Emma No. 1 and 2.

(BOWEN:) I desire to move to strike out the testimony of this witness with reference to the performance of annual labor or other labor upon the Emma or other claims known as the Emma, in the year 1890, 1891 and 1892 or any subsequent time subsequent to 1888 or 1889 and prior to 1904, for the reason, in addition to the reason I advanced in the introduction of such testimony, that the witness admits on cross-examination that all the work done by him between 1889 and 1904 was performed on the Emma No. 1 location which laid north of the Emma No. 2 and north of any ground claimed by the Emma No. 2 being the same ground as located by the Malta No. 1.

(COURT:) It does not appear that this work was not such
138 work as could have been done for the development of No. 2. That may appear later.

(BOWEN:) Our motion is not made for that reason. Our position is that any testimony relating to work between the time of the Independence location and the Malta location could not affect the issues in this case for the reason that if the Independence location was not a valid location, it would not make any difference whether they had or had not performed the work on the Emma.

(COURT:) Objection overruled, motion denied.

[Exception.]

*Testimony of John Sears.*

JOHN SEARS, called and sworn on behalf of the defendants, testified as follows:

I was born in Ohio and came to Idaho in the fall of 1880. Am 67 years old. Was in this part of the country in 1881 and was one

of the locators of the Emma No. 2 claim. Mr. J. H. Heller was with me when I made the discovery. Did not find anyone occupying this ground covered by what I staked out as the Emma No. 2. I discovered the vein on the Emma No. 2. I found mineral bearing rock in place. Before we made the discovery we ran a big cut 10 feet wide and 24 to 28 feet long, then made a discovery. We put
the stakes right on the lode; put up a monument on the No.
139 2, of rock. We placed a can on it with a notice of location in the can. I put a copy of that notice which you show me in the can. The ground was of such mineral character as an experienced miner would locate. After we made the discovery monument we staked the claim with stakes four inches in diameter and four feet above the ground. We marked upon those posts the name of the claim. We marked in on the inside towards the claim. I afterwards recorded the notice of location. After I staked and marked the claim I drove a tunnel about 50 feet; that was in 1881. I was up there in 1882. I worked there during the summer of 1882 and spring of 1883.

(BOWEN:) We desire the record to show that the testimony of this witness with reference to the Emma locations as we stated at the opening of Mr. Heller's testimony, is admitted without waiving any right to move to strike it out if it is not properly connected under the law with the Malta No. 1, and for other legal reasons. I may desire to make a motion later.

(COURT:) All right.

In 1882 we drove a tunnel, and an incline, crosscuts and raises on the Emma No. 2. The crosscut was run to the south; we struck a little ore. I guess we did in the neighborhood of a thousand dollars' worth of work on Emma No. 2 in 1882. In 1883 we did work to the value of $100.00. I was there about 17 days in 1884. I stoped out a bunch of ore. That was in 1884. I was on the ground alone in 1885. I worked for Mrs. Kettler about a month. Did about
$100.00 worth of work in 1885. After 1885 I went to work
140 again on the Emma No. 2 in 1905; that was then the Malta claim. I did the assessment work in 1905. I started down below on the works on No. 2; did work that year through the tunnel. That work tended to develop No. 2 or Malta No. 1. I was there in 1906. Work was done to the value of $100.00 in 1906. I worked there in 1907. I did $250.00 worth of work that year. I worked there in 1908; I did the assessment work; did work to the value of $100.00. Smith's work was done on the Malta No. 2. Smith did the work in 1906. The work I did in any year, no matter on what claim, it would tend to develop the other claim. The northwest corner of the old Emma No. 2 and the northeast corner stake are in place there at the present time. They are north of the new survey stake, 2337, about 35 feet. I have seen all the survey stakes of the Malta No. 1 survey No. 2337.

Q. Have you seen all the survey stakes of the Malta No. 1, survey 2337?

A. Yes sir.

Q. You have been upon the ground since that survey was made?

A. Yes sir.

Q. I would ask you to state where are those stakes with reference to the old stakes of Emma No. 2, all of those four stakes?

A. The northern end line is in the old position it always was in. The southern end line I could find no old stakes whatever
141 either on the Emma or the Malta.

Q. Just state what stakes you could not find.

A. Any of the old stakes of the Emma No. 2 or the old stakes of the Malta No. 1, I could not find? The new ones—that question is pretty hard to determine. They are about the right place; they are not far out of the way.

Q. Take each corner; how about the northwest corner of the old Emma No. 2 and the northwest corner of the Malta No. 1?

A. Same old place.

Q. Same stake, is it?

A. Same stake.

Q. How far is the discovery of Malta No. 1 from the discovery that you had on the old Emma No. 2? I will ask you how far from the discovery of the Malta No. 1—do you know where that is?

A. Yes sir.

Q. How far is that from the discovery you made on the Emma No. 2?

A. About fifty feet.

Q. How about the northeast stake on the Malta No. 1, is that about in the same place or position as the old northeast corner of the Emma No. 2?

A. Yes sir.

Q. How about the two south stakes on the Malta No. 1?

A. They are near about.

The last time I was on the Emma No. 2 was in 1885 and
142 I knew Mr. Swanson at that time. I met him over at his home and he was over on the Malta No. 1. I know the Independence claim. I saw him in the eighties, not in 1885. I saw the location stakes of Independence east end lines while I was up there in the eighties. The east end line of the Independence was about flush with the Emma No. 2 side line. I had stakes up there at that time. I saw the stakes in 1883, that is the first time I saw the end line. I did not see them in 1884 nor 1885. I went back next in 1905. I did not see any stakes on the east end line of the old Independence then. I did see the northeast corner of the Independence after that time; that was in 1906. It was about 70 feet southeast of the survey stake. That stake was changed at the time of the survey. They put it on the northwest. Did not find any of the Malta No. 1 stakes up when I went back there in 1905, except the north end. I did not find the southwest nor southeast corners in place. At that time I put up some stakes. I put up the southwest corner stake of the Malta claim in 1905. I made a mistake in regard to staking out the old corner; set it here; afterwards moved over there to where it stands now.

Q. You mean the northeast corner?
A. Southwest corner.
Q. That is the northeast corner; this is north; this is south; now how about the southeast corner, did you put a corner stake any place in the vicinity?
A. Yes; it stands right up on the ridge.
143 Q. On this ridge?
A. On this long saddle.
Q. Here is the saddle; was it on this ridge?
A. This ridge?
Q. Yes.
A. Up on the ridge, yes.
Q. Then you mean at the place marked stake on the ridge about or near the south side line of the Independence No. 2 and about the center of the claim?
A. Yes sir.
Q. How did you happen to set it there?
A. I made a mistake; for I had not been there for twenty years and I made a mistake in putting up those stakes.
Q. Then when did you find out your mistake?
A. I didn't move nothing but the southwest corner.
Q. Southeast?
A. No; southwest of the Malta, and I set that a little to the south and to the west. I afterwards saw where the southeast corner should be. That was over the saddle, the old original, down on the hill-side on the slope, over the ridge down in here. Corner No. 1 of Malta No. 1 is east of the survey stake. I have seen the southeast corner. That is in about the same locality as the southeast corner of the old Emma No. 2; I dont know whether it is on the right spot or not. I think it is within 15 or 20 feet of where the old original stake was. The southwest corner of the Malta No. 1
144 is a little to the west of the southwest corner of the old Emma No. 2; I don't think it is over 20 feet out of the way. From the Emma cabin I can see the west end of the southern line of the Malta No. 1. I can see the west side line of the Emma too a short distance about the centre of the side line. The cabin stands near the southwest corner of the Malta No. 1 claim. There are some cuts on the southern part of the Malta No. 1 lode. I do not know where the discovery of the Independence is. I have been up there all the fall. I saw where the east end stakes of the Independence were. I saw stakes near the east line of the Independence; they are on Independence ground. I have examined the ground lately. I found no depressions of any old tunnels or cuts. I saw a box with a notice in it with a patent application on the Independence No. 2. The box is west of the east line of the Independence about 40 or 50 feet. It is on the Independence ground. There is a big cut to the west of the box. The box I should judge is something like 30 or 35 feet from the large cut. The box is east of the big cut. I was a partner on the old Emma No. 2. Conveyed one-fourth interest in No. 2 to a man by the name of Emery. Conveyed the balance of my

interest to Tucker. George Garbit drew the deed at Hailey and I signed it and my acknowledgment was taken at that time. Left the deed in the notary's office for S. M. Tucker.

Q. I would like to have you state about how many feet of work was done on the old Emma 1 and 2 up to 1903, in your
145 best judgment.

(BOWEN:) Object to 1903; the testimony shows the witness was not in the country; if he limits to the time and years he was there, we have no objections.

(COURT:) He may answer.

[Exception.]

(BOWEN:) Of course we concede they might ask witness a question as to the amount of work that was found upon the ground when he got back; if that was the purpose of the question, it would be different.

(SULLIVAN:)

Q. When you came back there in 1905, about how much work had been done on the Malta No. 1 and No. 2 or the old Emma No. 1 and No. 2?

(BOWEN:) I object to that for the reason—further reason that it is indefinite and too general, and ask the court, if this testimony is to the value of the work as evidenced by inspection of the ground made in 1903, it has been limited to the work on each claim. They are not influenced by any work done upon No. 1.

[Objection overruled.]

[Exception.]

A. That is hard for me to answer accurately. A great deal of that work I know nothing about. Tunnels, shafts, inclines, upraises *and* etc., about 3000 feet of work had been done up to 1905 and about 1400 feet of that was done on the old Emma No. 2 and Malta No. 1. I know where the work on the old Emma was done.
146 The work that was done on No. 1 tended to develop No. 2.

Cross-examination:

I located No. 2 in 1881 with Mr. S. M. Tucker. I transferred the first one-fourth interest to a man by the name of Emery; some years afterwards I transferred the other share to Tucker. The last time I was upon the work prior to 1905 was in 1885.

Q. When you went upon the claims in 1905 you say you found no south end stakes on the purported Malta No. 1 location?

A. None whatever.

Q. You looked for them?

A. Yes; time and again.

Q. You could not find any?

A. No sir.

Q. You then put up stakes?

A. Yes.

Q. Where you supposed at that time was the line of the Malta?

A. Yes.

Q. The end line of the Malta?

A. Yes.

Q. Those stakes were put up by you; you put up the southeast corner stake and the southwest corner stake and the center stake, did you not?

A. Yes.

Q. In 1905 those stakes were put up some distance—how far were those stakes placed—that is the line of those stakes placed
147 south of these cuts which you have described as being along the lode line of the Independence No. 2 surveys, the lode line? You have described certain cuts here and have testified with reference to certain cuts that lie east and west along what is known in the map as being lode line of survey 2360 Independence No. 2; those cuts that you have in mind that existed upon the claim, how far south of those cuts did you place the stakes of the Malta in 1905?

A. The west about 225 feet.

Q. That would be south and up the hill, would it not?

A. Yes.

Q. And the southeast one would be how far from such lode line, or the line running due east and west through those cuts, how far up the hill south?

A. About the same distance.

Q. That distance which you speak of is your estimation but not according to any survey or measurement which you made at that time?

A. No sir.

Q. You went there having some interest in the Malta No. 1 claim, did you not?

A. Half interest.

Q. 1905. As co-owner you elected to place these stakes as you say, as you testified in your direct examination?

A. Yes.

Q. You testified in 1905 that when you placed the stakes here you had an interest in the Malta No. 1 claim?

148 A. Yes.

Q. You moved the southwest corner from where you placed it?

A. Yes sir.

Q. Further west and further south?

A. Yes sir.

Q. How far?

A. I told you about 20 feet. It would be the same place as where the survey corner No. 4 of the Malta No. 1 is at present. In July previous I moved this stake somewhere near the corner where the survey is at the present time. When I placed the stakes there on the south end of the Malta, I placed fir stakes. I marked them at that time in 1905. When Mr. Anderson came up there to make a survey in October, 1907, I did not call his attention to this stake which is near the ridge or saddle on the southeast corner as being one of the corners of the Malta No. 1 location. Part of the time

I assisted him in the survey. I knew he was running his lines. When he ran his lines for his survey from this stake and staked the line along the ridge, I was there then. The monument is there yet where he placed the stake of the southwest corner of the first survey. I remember the location.

Q. How far is the point where he placed that stake, the southwest corner of the first survey, from the southwest corner of the Malta location, which you placed in 1905?

A. I don't know; I think 1275 feet from the north end line. I was there when the south end line was run, that runs west
149 from the stake which appears on the saddle shown on the map a distance of 600 feet and the stake was placed at the southwest corner of that location. I think the stake which I placed was further south than the survey stake. I know where there is a trail that leads across the mountain. The southeast corner stake was placed south of the trail, the centre end stake south of the trail so is the southwest corner, up the mountain. When I placed the stakes there I thought I placed them right. At the time I placed them there I thought I was placing them about where the old original Emma stakes were, but subsequent to that time I have changed my mind and think now that the southwest corner is near where the survey southwest corner shows. The west side line of the Emma in 1885 was flush with the east end line of the Independence as it existed in 1885. That is one of the reasons that induced me to believe that the side line of the Emma was further west than what originally placed the Malta stakes. I came to the conclusion that the Malta location or old Emma location was still further west. In 1906 I understood the Independence had cut some valuable ore bodies on No. 49. Since I moved that stake, from what I learned, the ore bodies have all been cut since I moved that stake, except the one in No. 4.

Q. In 1907, you moved this stake?

A. Yes.

Q. You placed them in the first place in 1905?

A. Yes sir.

150 Q. Between 1905 and 1907 you knew there were some very valuable ore bodies cut in the Independence?

A. I heard it talked of.

Q. You understood; that fact didn't influence you in your judgment?

A. No sir; none whatever.

Q. You joined with Mrs. Kettler in making application for a patent in this case, didn't you?

A. Yes sir.

Q. Have you still an interest in it?

A. No sir.

Q. You sold out in 1907?

A. Yes sir.

Q. What was the consideration?

A. $1000.00.

Q. Did you get cash for it?

A. Mrs. Kettler she owes me nothing at all.
Q. Did she pay you cash?
A. Not cash, but she owes me nothing.
Q. You owed her the money, and you transferred in 1908?
A. Yes. Is it not a fact that I wanted to transfer this interest to Mrs. Kettler because I wanted to appear as a disinterested person in this case. I am the John T. Sears who was made a party to this suit.

Q. I call your attention to some cuts showing upon the map which lie east of the Independence lode—the original Independence lode, marked as unsurveyed, and in the center of the Independence No. 2 lode as surveyed, and particularly as to these cuts that are
151 within the limits of the side lines of the Malta No. 1 lode according to the survey, and I will ask you, I will ask you how many cuts along there within the limits, not from the map, but from your own recollection?

A. Three just inside the Independence No. 1 and 2 to the west of the side line of Malta No. 1. I just left there a few days ago. I have examined the land. Four or five inches of snow up there now. There are three small cuts going west in the Independence, up and down the hill and very close together. I suppose they may be 12 or 15 feet long and about four feet wide. These cuts were perhaps eight or ten feet west of the Independence west end line. There is a cut right where a body of quartz, I understand, was discovered, Independence lode claim. The cut is about 25 feet long and running into the hill south. It is about five feet wide. There was iron quartz ore exposed. In this cut there has been a tunnel started about five or six feet. This cut is about 60 feet from the three cuts I previously testified to. The box was about 30 feet from the last cut I have testified to.

Q. 30 feet east of this cut. Starting at the line now between the two claims, the end line on the Independence No. 2 and Independence and going east to the first cuts you come to—cuts on Malta line, is it one cut or more than one?

A. Two. Those cuts lie east and west of each other, up and down the hill. One a little lower than the other. The slope of the hill would be north and south where they would be. The
152 first cuts I speak of, one would be northwest of the other about 25 or 30 feet down the hill. One of them is a good sized cut four feet wide and 10 or 12 feet long. Those cuts are all caved.

Q. Those are old cuts?

A. The large one; that was the cut with the tunnel on; I was there at the time it was run.

Q. You mean the one on Independence No. 1?

A. No. 2, the one I am testifying to now; the other cut was a short tunnel. The large cut as it shows was 34 feet long. Heller was working on it in 1903. I and Mr. Heller ran a cut there east of that I judge 300 feet in 1882.

Q. There are no cuts I understand between those two cuts you have testified and the end line of the Independence?

A. Yes; there is one higher up on the hill a little to the west—south.

Q. How far up?

A. 100 feet or more away from the one just spoken of and a little higher.

Q. 100 feet or more which direction, north?

A. Southwest, up the hill. It was a small cut 10 or 12 feet long. This cut which I saw Heller run in 1883, going west of that there is only one cut, a small one which lies a little northwest between that cut and the side line of the Independence. This cut that Mr. Heller run in 1883 had a good many brush, a good many brush around it at the present time. There are two cuts, one right below the other that Heller worked in 1883, those cuts have cherry brush
153 around them. Those I speak of as being made by Mr. Heller had cherry brushes around. The one I speak of as going a little northeast of that has also cherry brushes around it. There are four Malta claims. There were not four Emma claims in my time; know nothing about Emma No. 3 and No. 4.

Q. When you speak of the 3000 feet of work being done, where did you mean that this 3000 feet was done, on No. 1 or No. 2 which you had recorded?

A. The work up to 1895 represented the two lower claims, Emma No. 1 and Emma No. 2; No. 3 and 4 you didn't have recorded.

Q. 3000 feet were all done on Emma No. 1 and Emma No. 2?

A. Represented the other claims after they came in. The upper claims and lower claims I suppose. Up until 1885 the most of the work was done on the Emma No. 2. There is about 1400 feet done on the Emma No. 1.

Q. On the Emma No. 2 on the Malta No. 1 he testified. Where was the other 1600 feet?

A. That was up north on No. 1 Malta or No. 3 Malta; but I started a crosscut tunnel and I did three years in that tunnel, that is situated on the Malta No. 2. All the tunnels are situated on No. 1 and No. 2 and the greater part of the work was done in the tunnels on the northerly claim.

Q. On the southerly claim, that is the claim that conflicts with the Independence, that is the Emma No. 2 and the Malta No. 1
154 being identical as supposed to be, how many tunnels did you have upon that ground in 1905, that you saw there?

A. There are six that I know of.

Q. Understand that is on the southerly claim.

A. I know.

Q. That is what you are talking about?

A. I thought you said both of them.

Q. In the southerly claim?

A. Three, I think; three or four.

Q. Three or four tunnels?

A. Yes. Heller and I ran the old tunnel something near 400 feet and one is 300. The two tunnels I know anything about were 700 feet on the southerly claim.

Redirect examination.

Q. Point to the stake here on the ridge which you say you set as the southeast corner of the Malta No. 1 in 1905 or 1907.

A. It was 1907, no—1905. I did not step off the distance nor measure it in any way from the northeast corner or from any other corner. I walked over on the ridge and guessed at the distance. Just put up a post; put up a stake over here as the southwest corner. My remembrance was of where the old stake stood. I had not been on the ground for twenty years. I didn't remember where the old stake stood and I had to set them to the best of my memory. After that I made a further examination and found out that I was wrong.

155 Q. When you went up there in 1905, did you have any conversation with Swanson?

A. Yes sir.

Q. What did he say, if anything?

A. He told me the ground was jumped, and there was no stakes on it.

Q. What ground?

A. The old Malta ground.

Q. Did he tell you what to do? Did he make any suggestions?

A. No sir; that is my recollection; that is all he said to me.

Q. Said there was no stakes up, the claim was jumped? Which Malta was he referring to?

A. No. 1, to the south.

Recross-examination.

The conversation between me and Swanson occurred when I first went up and told him I had an interest in the Malta. I told him that I had by some arrangement with Mrs. Kettler obtained an interest in the Malta. He stated the ground was jumped and there were no stakes up. That is the substance of what he told me.

*Testimony of Samuel Tucker.*

SAMUEL TUCKER being called and sworn on behalf of the defendants, testified as follows:

156 I was once a resident of Blaine county, old Alturas county, from 1881 to 1901. I am a son of S. M. Tucker. I know of the Emma location in the Independence gulch. I was first on those claims in July, 1881. I took provisions up there, went up and right back the same day; Mr. Heller and Mr. Sears were up there at that time. The claims were staked at that time. I saw the stakes on the south end of Emma No. 2. I don't think there was a year passed that I was not up to the claims up to the time I left here in 1901. I did not do any work there individually in 1881, 1882, 1883 or 1884. The first time I did work there was in 1888 and I was up there in the year 1887. A couple of Cornish boys had a lease on the Emma No. 2 in 1887. I saw the work done there that year. They drove in the neighborhood of 100 foot tunnel. I did

not have any experience in mining at that time, but have since on the Emma mine. I have worked about four different times up there. I am acquainted with the nature of the ground there. I know about how much work could be done there by a man in a day. I saw the work they had done at that time. They did at least $100.00 worth of work on the Emma No. 2 for the year 1887. The stakes were up on the Emma No. 2 in the eighties. I saw the stakes most every time I went up to the mine. I would stay at the cabin when I was up there. One northern end stake of the Emma No. 2 was just down below the corner stake discovery west of the cabin. The cabin had been moved now from where it originally stood, moved down south. I could see the northeast corner
157 and the northwest corner of the Emma No. 2 from the cabin that I stayed in. You could see the southwest corner stake from the cabin, and the southeast stake is not in sight, it is over the hill. I have been over to the southeast corner. I saw it just over the ridge from the cabin. The southwest corner was in sight of the cabin. While I was up there I saw stakes on the Independence. They were flush with the west side line of the Emma No. 2. I have been up there twice lately and saw the official stakes that were put up there for survey 2337. All those four stakes stand in the immediate vicinity where the old Emma No. 2 stakes used to stand, and the Malta No. 1 will cover the same ground as the Emma No. 2. After the year 1887, I was up there in the fall of 1888. I went up there with John Smith to do the assessment work. We did the assessment work to the right of where the cabin now stands on the Emma No. 2 claim. Did about $175.00 worth of labor on the Emma No. 2. We run a tunnel about 40 feet, and furnished our own supplies and tools. In 1888 I did work to the value of $100.00 on Emma No. 2. I do not know where John Smith is. He was here in 1886 and 1887 and worked on a farm north of here known as the Tucker ranch on Indian creek. I lived there from 1881 until I left there. Mrs. Kettler, the defendant in this suit, is my mother. My father died in 1899. While I was there I know where the Emma No. 1 was located. It is north of the Emma No. 2. I have been
158 over on the Emma No. 2. Work done on the Emma No. 1 would tend to develop No. 2. I was up there in 1889 with George Haverly. We had a lease. We did part of the work that year on No. 2 and then crossed over and worked on No. 1. We drove about 30 feet of tunnel on No. 2 in 1889. 30 feet of tunnel would be of the value of $100.00. I don't think I was up there in 1890 or 1891. I was there in 1892 and worked for a man by the name of Hendrick. We were leasing. I worked for my father for wages. In 1892 and 1893 we were leasing and we worked on No. 1.

Q. How much work did you do in 1892, at least?

(BOWEN:) We want to renew our objection to any work done on those claims after 1889 for the reasons advanced in objections to other testimony of the same character.

(COURT:) Overruled.

[Exception.]

A. We did enough work in 1892 to represent the Emma No. 1.

The work we did there at that time developed No. 2. Worked in 1893 during the winter. We worked then on No. 1. We did work to represent both Emma No. 1 and Emma No. 2, $100.00 each. I was up there in 1894 with John Heller. We dug about 300 feet of tunnel during the winter of 1894. The work was done on No. 1. That work tended to develop No. 2. The work we did on No. 1 in 1894 was sufficient to represent No. 2. The centre of the claims is sloping to the west, and the southern claim slopes to the
159 north, and the northern claim slopes to the south. The tunnel I and Hendrick ran we started and run due north, cut underground and run north I judge about 75 feet and struck the ledge and started to drift it back in the direction towards Emma No. 2. We did enough work on No. 1 to represent No. 2 to the value of $100.00. I was there in 1898. I was doing the assessment work then. The first work I did was to remove the cabin from where it stood to its present location, and then run a tunnel next to the cabin on No. 2. We drove about 30 feet to the value of $100.00. I was there in 190—; did work then on No. 2; we did work there to the value of $100.00. When I was there in 1889 I saw Mr. Swanson. We used to visit quite frequently back and forth.

Q. Did Swanson at that time make any claim to any portion of Emma No. 2?

(BOWEN:) Objected to as immaterial and not proving or disproving any of the issues in this case.
(COURT:) Objection overruled.

(SULLIVAN:)

Q. Did he?
A. He did not. I saw Swanson other years and had no more than general conversation with him. He knew we were working there. I was over to his place some of the time.
Q. I will ask you that if during any of those times he made any claim to any portion of the Emma No. 2?
A. He did not.

[Objected to.]
[Overruled.]
[Exception.]

160 Q. Did he at that time make any statement or tell you that there was a location of Independence No. 2?

[Objected to for the same reason.]
[Overruled.]
[Exception.]

A. He did not.
Q. When was the first you heard of the Independence No. 2?

(BOWEN:) Objected to and not proving any issues in this case.

(SULLIVAN:)

Q. Withdraw the question. Did you ever see any stakes of the Independence No. 2 lode at any time you were ever up there?

A. No sir.

Q. Were you there at any time after July 1889, in that same year?

A. Yes sir. I never saw any stakes of the Independence No. 2 at any time I was up there. I was there after July, 1889. I did not see any then. When I made my examination up there a few days ago I did see the survey stakes on the west end line of the Independence No. 2. Those stakes were in position so I could see them from the cabin. I know of some cuts on the Emma No. 2 near the west side line. They are on the Malta ground. They were on the Emma No. 2 ground when I was up there in the eighties. I have examined the ground between those cuts in a westerly direction to the Independence mine. I first saw cuts on the Emma ground.

161 I saw cuts the west of those cuts I judge about 50 feet from the line of the Independence No. 2. I did not discover any other cuts between those cuts and those cuts on the Independence ground.

Q. How about this mark on the map, this 142 feet in there, you see on that ground across that triangle, how about that in there, cuts there?

A. Yes; there are two.

Q. On that triangle?

A. Not on the triangle, this line.

Q. You don't understand me then; you mean east of the west line of the Malta No. 1?

A. Yes.

Q. Now I want to know from the west line of the Malta over to the east end line of the Independence, that 142 feet there, are there any cuts in there?

A. No sir. I was over that ground. No indication of any depressions of any old work there. I know where the discovery cut of the old Independence is. I saw a box while I was up there, with a notice in it. It was a plat of the Independence No. 2 on the Independence ground.

Cross-examination.

I was born in 1866. I have lived in the neighborhood of Hailey up until eight years ago. I assisted in the performance of work upon the old Emma in 1889, not in 1890, not in 1891, did in 1893, 1894, 1895, not in 1896, 1897 nor 1898, did not in 1899, nor in 1900, not in 1901. Havery worked with me in 1889. I worked

162 with Hendrick in 1892 and 1893; I was with Heller in 1895 and 1894. Hendrick was in Nevada the last time I heard of him, and Havery is here. I was interested in the lease with Heller. I worked for Hendrick and he had a lease; he took the lease sometime in August; I did not work for him then; I went to work for him about Christmas and worked until March. I was leasing until in 1889 and was not in 1888. The

first work I did there was in 1888. In 1887 the work was done by the Cornishman who had a lease. They took the lease some time in the summer of 1887. I don't know the terms of the lease. I know what they were leasing. The work I did in 1898 and 1—was not under a lease. I don't know whether the work in 1890 and 1891 was under a lease or not; I didn't work. I didn't do any kind of work on these claims prior to 1888 and a man by the name of Smith helped me. I last heard of him eight years ago. He was working for McFarlane in the year 1888 and was a single man. I went up there the 1st day of December to do this assessment work. We worked continuously during that time. Smith was about 30 years old. We stayed at the cabin. In 1887, when the work was done by those Cornishmen, part of the work was done on Emma No. 2. Drove in the neighborhood of 60 feet of tunnel. That is south about 75 feet between dividing lines between the two Emmas. In 1888 we worked just down the hill and to the right a little of that. When Mr. Smith and I went up in 1888 we drove the tunnel about 40 feet further and then we crossed over and
163 worked on No. 1 for about two weeks and dug about 20 feet.

I could not say what time of the year I went there in 1889. In 1892 and 1893 I worked on the Emma No. 1; in 1894 and 1895 on the Emma No. 1; 1898 and 1900 I worked on No. 2. The work I did on No. 2 was within 175 feet of the north end line. During the years that I was up there I went quite frequently over to Swanson's, and he occasionally came over to our house. All the work I did in the nineties was to represent three Emmas. The fourth Emma didn't come along until in 1895. The work in 1888 was supposed to represent the three Emmas. In 1888 I think Swanson and I hollered back and forth. I am not prepared to say that I ever went there in December; I don't remember whether Swanson was over to my place during the time I was up there in 1888. In 1889 I resided in the cabin. In 1889 I could not see any stakes on the Independence and I did not look for them. Could not see any stakes there on the Malta in 1889. In 1889 I will swear that there were no new stakes that I could see from the cabin. I cannot testify as to the terms of the lease that the Cornishman had in 1887. My father generally leased it two years. I don't think he ever leased it for less than a year.

Redirect examination:

I was married on the 25th day of July, 1888, and lived together five months. and that is the way I fixed the time when I did
164 the assessment work in 1888. I made up my mind that I was going to leave the country; I left there on the 24th day of December and came to Hailey and borrowed $80.00 and left Christmas day, 1888.

*Testimony of A. J. Sullivan.*

A. J. SULLIVAN being first called and duly sworn on behalf of the defendants testified as follows:

I am acquainted with the defendant, Nancy M. Kettler, and have known her nine or ten years. I was the locator of the Malta No. 1 mining claim up Independence gulch.

(BOWEN:) Object to any details, any question as to how he came to locate the claim as incompetent, irrelevant and immaterial, don't prove any of the issues in the case, anything he might say as to the reasons; don't affect the validity of the location.

(SULLIVAN:) We expect to show that this claim was located by agent for Mrs. Kettler.

(COURT:) Why he did it, under the general objection, would be absolutely immaterial to the case; the fact is he did it. However I am not passing on what you propose doing.

(SULLIVAN:)

Q. I will ask you for whom you located the Malta No. 1?

(BOWEN:) Objected to as immaterial and not the best evidence.

(COURT:) He may answer.

165 A. She came back here just before Christmas in 1903.

Q. Go on and state how you came to locate it for Mrs. Kettler.

(BOWEN:) Objected to as immaterial, the reasons not proving or disproving any issues in this case. He has testified he has acted for her and it does not make any difference what the reasons were. He acted for her and it was a legal act, and that is all that can be material in this case. We object to it for the further reason that the witness cannot testify as to the facts stated in the statement, he not being able to state whether or not the work had been done by somebody else or had not been done, being hearsay on his part.

(SULLIVAN:) We want to show the good faith of this defendant.

(COURT:) The evidence may go into the case and the ruling will be withheld, or a ruling made now. However that matter will be passed upon when the case is finally determined. He may answer. Make one general objection and preserve the record, so there will not be any necessity of repeating it.

(SULLIVAN:)

Q. Go on and state how you happened to locate the claim for Mrs. Tucker.

A. Mrs. Kettler had made an effort to get somebody to do the work.

(BOWEN:) I move the answer be stricken out.

A. Mrs. Tucker, I went for her because the time was limited, there seemed to be no one else to go, she had applied to others.

166 (BOWEN:) Object to the answer and move it be stricken out.

(COURT:) It may stand except the last part of it—"she had applied to others."

A. I told her if I knew where the claim was I would go up and do the work myself and locate it.

(BOWEN:) Object to any discussion between him and Mrs. Tucker at that time with reference to the location of Malta No. 1, as being immaterial, irrelevant and incompetent and for the further reason it is hearsay and declaration which is selfserving—selfserving declaration between the principal and her agent.

(COURT:) Objection overruled.

[Exception.]

(SULLIVAN:) I withdraw that.

I left town on the 31st day of December, 1903, in company with Mrs. Tucker and Will Sullivan, my son, and went up to those claims on Independence gulch. The ground was covered with snow. When we got up to the Independence gulch Mrs. Tucker and myself started up to Swanson's residence; we had not gotten up to the house before I saw Swanson. He saw us as we were going up the gulch and he spoke to Mrs. Tucker and she introduced Swanson to me.

(BOWEN:) At this time we will not make any objection but will reserve the right to strike out this testimony; we do not waive any rights at this time.

(COURT:) As to the general estoppel?

(BOWEN:) I suppose so.

167 Swanson said "why, what brought you up here, old lady?" and she told him she wanted to re-locate those claims and he said "woman, I would not allow any dam- man to take those claims," and he invited us up to the house. We stayed there that night and talked over the claims, the Emmas No. 1, 2, 3 and 4. Mr. Swanson did not that night make any claim to any portion of the old Emma No. 2. He did not make any statement about the Independence No. 2 being located over any of the old Emma No. 2. I wrote the notices out. I had blanks and Mr. Swanson furnished pen and ink and he dictated to me. Mrs. Tucker said to him that she wanted to locate the Emma claims and they talked it over the night before about her not having good luck with them and changing the name was suggested. Mrs. Swanson suggested the name; said they were married in a town by the name of Malta. That is how the claims were named Malta. Mr. Swanson dictated the descriptions and I wrote the notices. I didn't know anything about the ground only as Mr. Swanson and Mrs. Tucker talked it over; never had been on the ground before. After writing out the notices, Swanson, Will Sullivan and myself went to locate the claims and stake them. We took some stakes from his woodpile and was present when I took them. We went to the southeast corner. The evening before Swanson had told us he thought the stakes were intact or set and we would have no trouble to find the corners and when we talked about taking

stakes, I think he said he was pretty sure, he knew part of
168 the stakes were there if not all of them. He stood there and pointed out the lines, west lines of the Emma, the corners. From where I was standing I could see the two northern end posts of the Emma No. 2.

Q. Were those stakes pointed out to you by Swanson while you were there?

A. Mr. Swanson.

Q. What about the boundary lines?

A. He said he knew where the boundary lines were.

Q. Did he show you?

A. Yes sir.

(BOWEN:) Object to as leading. I ask the witness to testify and not counsel.

Q. Go ahead and tell what he did.

A. Mr. Swanson pointed to the corners and he represented where the lines would be from the corners to run east of his house; we were on a raise of ground; we could see the points from where he showed us, supposed to be the corners, we could see the two northern corners of the claim.

Q. Emma No. 2?

A. Emma No. 2 and the southwest.

Q. The southeast—the southwest corner, did you see there, that was from where you were standing?

A. Yes sir.

Q. Who pointed that out to you, if anyone?

A. Mr. Swanson did, he pointed—there was some brush
169 there, I guess it was cherry, wild cherry, something of that kind, some black object, seems to me it was cherry, I am not sure, seemed just to be there near the corner.

Q. Could you see the southeast corner?

A. No sir, you could not.

Q. What did you tell him; what did Mrs. Kettler tell him, she wanted to re-locate?

A. She wanted to re-locate the Emma ground.

Q. Emma what?

A. The Emmas No. 1, 2, 3 and 4.

Q. Those lines and corners were pointed out to you by him?

(BOWEN:) Objected to as leading.

A. Yes; they were pointed out.

(Move to strike it out.)

Q. Where did you go then?

A. We went to the location—discovery, wrote the location notice where we put the monument or stake.

Q. Where was that?

A. With reference to the cabin it was on the north end of the claim perhaps 200 feet east of the west side line and I should say 50 feet or so south.

Q. On the north end line?

A. North end line and east of the house—of the cabin. That claim was the discovery of Emma No. 2 and re-location of Malta No. 1. We made a monument of rock. We put the location notice on it, by writing the name of the mine, name of the locator and date.

(SULLIVAN:) I wish to offer in evidence certified copy of
170 the notice of quartz location of the Malta No. 1.

(BOWEN:) Object to it at this time for the reason that the location notice does not appear to be a re-location of any claim or claims, but an original location, and for the further reason that it appears from the location notice itself that this location joins the Independence mine on the north thereby recognizing the existence of the Independence mine lying to the south of the location made at this time.

(COURT:) Objection overruled.

[Exception.]

(COURT:) It may be admitted.

[Exception.]

Q. I will ask you to examine this exhibit I and see if that is a copy of the notice of location you placed in the can you speak of.

A. Yes sir.

Q. What is your answer?

A. Yes sir; that is the notice of location.

(COURT:) Is that the copy or original?

(BRODHEAD:) This is a certified copy.

(SULLIVAN:)

Q. Now I ask him if he placed a true copy of this in this can at the discovery. Then what did you do?

A. Placed a copy of that in the tin box at the foot of the stake. After that went and put up the stakes to the claim. We found a stake at the northwest corner of the Malta No. 1 or Emma No. 2 and marked the name of the mine on it and date and the number of that stake. There was a post on the northeast corner of Malta
171 No. 1. The posts were set already and we used the same posts. The northeast corner my son marked with a pencil—"The northeast post of the Malta No. 1." There was a post at the southeast corner of Malta No. 1, that is over the ridge from the house and the southwest corner there was a post there. The posts were four inches or more in diameter and something over four feet above the ground. I did not go all the way around on all the claims. When I marked the northeast corner post Swanson and Will were at the discovery stake putting up a monument. They were not there when I did the writing. On my rounds I didn't notice any stakes of the Independence lode; I noticed a stake way down in the gulch, that was on the pipe line or water line. After the locating of the Malta No. 1 there was some discovery work done. A young fellow by the name of Stephenson went up with my son to do the work. I was up there Monday and saw the survey stakes of survey

2337 of the Malta No. 1 lode. The survey beginning at the northwest corner, that stake is west—that stake is south of the stake that was made southwest corner of the Malta No. 1 claim. Survey stake 2337 is south 60 or 70 feet from the corner of No. 1. The southern stakes were south of the location. No; they were north of the location corner something like 70 to 100 feet.

Q. I want to ask you about the description of this quartz location of Malta No. 1. Does Exhibit 1 read that it joined the Inde-
172 pendence mine on the north; have you any explanation to make of that?

A. Joins the Independence mine on the north, well there would be the Independence east end line coming to the Malta side line; I would think there was a greater portion of it north than there would be south, setting at the head of Independence gulch and join the Independence mine on the north.

(BOWEN:) Object to his explaining any notice; the notice speaks for itself; I move it be stricken out; the explanation is the conclusion of the witness.

[Arguments.]

(BOWEN:) I move to strike out this conclusion and argument. In addition to that if he is permitted to swing that location all over the hill, of course, there is not any such thing as locating a mine on a hillside, nobody can explain it, nobody can add to it or take from it; the notice is what we are governed by; the notice as introduced in evidence must stand as evidence in this case.

[Arguments.]

(COURT:) The last motion is sustained.

[Exception.]

(SULLIVAN:)

Q. I will ask you who dictated that description?

(BOWEN:) Object to that for the reason that it is a repetition.

(BOWEN:) Withdraw the objection, but object to it on the ground that it is leading and suggestive.

173 (SULLIVAN:) I will stand upon the question.

A. I would like to speak, Judge.

(COURT:) Just a moment, Mr. Sullivan; you will get a chance to tell your story. The objection will be denied.

[Exception.]

Q. State who, if anyone, dictated this description to you.

A. I don't mean to answer too quick.

(COURT:) Go ahead and answer the question.

A. Mr. Swanson.

Q. Did he dictate all of it?

A. He dictated the description right through from start to finish.

Q. And then on that, did you locate any ground adjoining the Independence on the north?

(BOWEN:) Objected to as leading.

[Overruled.]

[Exception.]

Q. I will ask you if, after this discussion, and dictation to you of this description, you then located any land that joined the Independence on the north?

A. I did not.

Q. Under the description, with reference to the Independence lode, where did you locate the Malta No. 1 and place the stakes?

A. The Malta No. 1 is situated, as I understand it, covering the very same ground as the Emma No. 2.

(BOWEN:) Object- to and move to strike it out.

174 (COURT:) The last answer may be, not responsive.

Q. In what direction from the Independence lode?

A. It was east and north.

Q. In what direction was the southern portion of the Malta No. 1?

A. South.

Q. From the Independence?

A. From the Independence?

Q. Yes.

A. It would be southeast, as I understand.

Cross-examination:

I went up there the 31st day of December, 1903, and the location was made the 1st day of January, 1904. It was not the best of day and it was not the worst, it was not really snowing, it was a little bit cloudy, it looked a little like a storm. The snow was not very deep, there was plenty of snow for sleighing. In places it was deep and some places there were not any. Some places it was several feet where the snow drifted. We walked from the gulch up to Mr. Swanson's house and stayed there all night. Mrs. Kettler, my son and myself lodged all night with Swanson and had supper that night, breakfast next morning and dinner.

Q. You went up there, as I understand, for the purpose of locating four claims, did you not?

A. I did.

Q. Malta No. 1, 2, 3 and 4?

A. Yes sir.

175 Q. That is, you went up there to locate the ground?

A. Re-locate the ground.

Q. You had made up your mind to go up and locate this ground there on behalf of yourself and Mrs. Kettler, as you have testified, the intention to locate this ground was formed before you went up there, was it not?

A. Formed before I went up there?

Q. Yes; in other words, you had the intention to locate this ground before you went up to Swanson's place, you and Mrs. Kettler or Mrs. Tucker at that time? In other words, you made up your mind and formed the purpose to locate that ground before you went up there, didn't you?

A. We went up there to fix that ground in some way so she could hold it.

Q. Made a location on it?

A. Location.

Q. The purpose was formed before you went up to Swanson's place?

A. I don't know as it was.

Q. You hadn't made?

A. I meant to go up and do whatever was necessary.

Q. It was located in your name, was it not?

A. It was.

Q. You say you located it for Mrs. Kettler?

A. I did; Mrs. Tucker.

Q. Tucker at that time?

A. She was Mrs. Tucker then.

Q. You had made up your mind to locate them for Mrs. Tucker before you went up there?

176 A. I cannot say that I made up my mind what I would do until I went up there to see.

Q. Do you mean to tell the Court you didn't decide to locate them before you went up there?

A. I decided to do something, whatever was necessary to hold the land.

Q. In order to locate, you went up for that purpose?

A. We were up there to do something, yes.

Q. Didn't you take location notices with you?

A. I did.

Q. Took location notices from Hailey?

A. Yes sir. I think I have stated all the conversation that took place there that night or the next morning with reference to the location of this land. I don't remember about any dicussion about any veins running east and west; Mrs. Tucker, Mr. Swanson and my son might have. I am not a practical miner. I presume I heard all of the conversation. I was not interested in the location as far as my own personal advantage was concerned. There might have been something said about veins. I don't recollect nothing at all about anything being said that it would be better to make the location east and west instead of north and south. I think if there was anything of that kind, I would have had a recollection of it. When I went up there I expected to be guided by whatever Mrs. Tucker said and desired in the matter. The location notices were prepared on the morning of January 1st after we had our breakfast. Mrs.

177 Kettler, Mr. Swanson and my son were present when they were prepared and I did the writing. We talked about the relocation and it was understood, as well as my recollection goes, that Swanson knew where the old Emma was and we prepared the notices according to that. I don't think anything was mentioned about me not wanted to interfere with any of Swanson's claims. I understood Swanson owned the Independence mine. I understood the next morning when I was going through the mine that he had a group of mines and that those mines were called the Independence.

Q. At no time during that night or the next day was there any conversation between you and Swanson or between Swanson and

others that you heard, with reference to the location of the Emma with reference to the Independence, is that true or is it not?

A. Oh, Mrs. Kettler had some talk—conversation about the mines, I know they did; I don't know exactly what the conversation was; I don't know whether she said she didn't want to interfere with his mine or he with hers.

Q. Not what you supposed, but what you heard?

A. I call nothing to recollection now.

Q. Do you recollect there was something said about details which you do not remember in relation to the Emma and the Independence?

(SULLIVAN:) He didn't testify to that.

(BOWEN:) I object to the interference.

(SULLIVAN:) When you put a question in that form, as-
178 suming that he has said something, we have a right to object.

(COURT:) You may continue your question, witness can take care of himself.

Q. Was there not some reference between Swanson and Mrs. Kettler in regard to their mines overlapping, bearing near each other, or something of that kind?

A. I don't remember the substance of any conversation in regard to that at present.

Q. Do you remember such conversation in which such matters were talked about, although you do not remember the details of it, but that there was some sort of a conversation as you remember?

A. I don't remember any conversation in regard to it.

Q. You don't remember any conversation?

A. No sir.

Q. When the matter was first spoken of as to the Emma, you stated to Swanson, did you not, or about that time, that you came up there for the purpose of locating some ground for Mrs. Tucker? You told Mr. Swanson that, did you not?

A. I presume we did. Talked about it after she told him; I don't remember the words said to him.

Q. Did you tell Swanson that you came for that purpose?

A. Perhaps.

Q. During that conversation, don't you know you did tell him that you didn't come for the purpose of interfering with any
179 ground that he might have, but simply to locate some ground for Mrs. Tucker or Kettler?

A. I went up there, of course; I did n't suppose——

Q. I am asking you if you didn't so tell him—tell Swanson that?

A. I don't know as I told him anything about it myself what I was doing or what was not doing for myself.

Q. The question was, if yourself or Mrs. Tucker?

A. I do not have any recollection of anything of that kind.

Q. Will you say that you did not tell him such a thing?

(SULLIVAN:) Object to as a repetition of the same question.

(BRODHEAD:) Counsel has endeavored to refresh his mind time

and time again, *it* said he don't remember it; it seems to me there should be a limit.

[Arguments.]

[Objection overruled.]

[Exception.]

A. Did I say I didn't tell him anything?

(BOWEN:) That was the question.

A. I don't understand that.

Q. The question before that related to whether you told Mr. Swanson you didn't come up there for the purpose of interfering with any ground he had.

A. I will say now that any conversation that I can re-
180 member that was had up there, or talk, I don't hesitate at all to tell; of course anything I do not remember I cannot tell.

Q. The question is this, would you say that such a conversation was not had?

A. Not had to my knowledge.

Q. When you went outside on the morning of January 1st, what was the first stake that your attention was called to?

A. The first stake was the northeast corner—no, the northwest corner of what is now the Malta No. 1. I was far enough over from the woodpile to see the stake when my attention was called to the northwest corner of the Malta No. 1. We then went towards the north. I know we walked over there a ways, over on the brink, so we could see the stakes, but I do not remember the distance, it is a back yard close to where the woodpile was at that time. I stepped out in the dooryard and he called my attention to the northwest corner of the Malta No. 1, old Emma. I don't remember of his calling my attention to the neighbor corner at that time. He told me that the two claims lay north and two claims south of it, that was the dividing line between the two claims. I don't know that my attention was called to any other particular stakes. I don't know what he said with reference to stakes being covered with snow. I remember the rocky bluff, but don't remember what Swanson said in regard to the bluff. My attention was called to it. I don't re-
member what was said about it, only that that was one of
181 the claims. I don't recollect anything being said about a stake being over the ridge covered with snow. When we went out to the woodpile Mr. Swanson was there and I think Mrs. Kettler; I am not sure whether my son was there or not. When we started out to the woodpile to go to the corner, if my recollection serves me right, my son was down taking care of the horses at that time; I am not sure, but that is the way it seems to me; Swanson and I; I am not sure but I came back, seems to me too now I came back before we started, because in speaking of the stakes I said we better take three or four stakes and I think he took the pick and three stakes.

Q. To get your memory refreshed again so we will be straight on this, this conversation you had was the first thing the next

morning when you went outside and he pointed out to you the northwest corner?

A. I am not sure he pointed it out. We started for the corner when we started for the claims; I am not sure whether he pointed that out that morning while we were at the woodpile.

Q. Your memory seems pretty good as to other details of this matter. I will ask you again, in order to get it straight, if when you got up the next morning after you had breakfast and this location notice prepared, you didn't go out of the house and go out to the woodpile and Swanson and yourself have some conversation there with reference to the different stakes or different lines?

A. I don't recollect any conversation especially at the
182 woodpile when we were getting stakes.

Q. Didn't he point out to you at that time the stake at the northwest corner of the Malta No. 1?

A. It seems to me it was when we started off to the mine that he pointed out this stake.

Q. Didn't he point that out the first thing when you went out to the woodpile?

A. There was some conversation about that, but it seems to me in the evening; I don't remember now whether that was the stake in the evening pointed out or when at the southwest corner, but towards the southwest corner; we could not see the one at the southwest corner from where we stood we could not see that one, but there was up on the hill somewhere about in line with that; that is my recollection now about that.

Q. Your recollection is not very perfect as to where those conversations occurred with reference to the different stakes talked about before you say you started and he went over to those stakes with you; you had some conversation that night, outside the next morning?

A. That night, I don't know that the stakes were pointed out, but the line, I understood about where it was, I saw from what he said the evening before.

Q. When was this rocky point or bluff pointed out to you or your attention called to it, that lay away east?

183 A. I am not positive whether that was in evening or morning.

Q. When was the southwest corner pointed out to you?

A. I don't remember; we could see the southwest corner from where we stood; after we went on the south of the house there was a point there we could see the southwest corner about there the location was; we could not see the southwest corner from the position we stood by the woodpile.

Q. At the woodpile you could not see the southwest corner, but went to the other side of the house—south of the house?

A. At the time we were back of the house I do not remember of looking to the west; I don't remember of seeing any stake only an object about in the line with that line on the southwest corner.

Q. When did he point out to you the southwest corner?

A. We had a general talk in the evening.

Q. When you were in the house?

A. No sir; it was after we were in and then went out in the evening and in the morning went out.

Q. What do you mean by general talk?

A. General description of the land and pointing out around where the claims were, the Emma claims.

Q. In the morning he pointed out to you the stake *out* the south west corner which you saw was the southwest corner?

184 A. He pointed it out in the evening when we went out there; he pointed out—kind a pointed around here, I thought we understood about the line where these claims were, but I don't remember about any stakes in the evening; I don't remember about noticing stakes until we started to stake them out.

Q. Then you understand your general attention was called to the surrounding country that night before you noticed the stake at the southwest the next morning?

A. No sir, I didn't notice the stake at the southwest corner from where we stood, at all.

Q. Did you ever see the stakes of the southwest corner from the house or about the house?

A. I saw the stakes there, yes.

Q. Was that pointed out to you as the southwest corner?

A. After the staking was all done we went out there where we could see to see how many of the stakes we could see.

Q. You went out?

A. My son and I; I don't know whether anyone else.

Q. Then you could see the southwest corner?

A. Yes; from the south of his house.

Q. Which you had placed up there or which you had marked?

A. Marked, yes.

Q. After the stakes were got the next morning, where did you go?

A. I went with them down to the corner—followed them

185 around. My son and Mr. Swanson went with me. I am positive Mr. Swanson went. Went to the northwest corner of the Malta No. 1.

Q. Mr. Swanson went with you?

A. No sir, he didn't; he went—he and my son went to the discovery stake where they made a monument; there was not any stake there at all until they put one there; they were there when I went to the northwest corner of Malta No. 1. I went there and did the marking while they were setting the stake and making the monument.

Q. Did you and Swanson and your son start together?

A. I am not positive whether my son, I think he did, he had been to take care of the horses and I think he came and went with us, I am positive, from the house. Three of us went away.

Q. How far did you go together?

A. They outwalked me; they were ahead of me, we went probably not very far together, but we were on the some tour; I was behind them part of the time. We went in the neighborhood of the cabin and I went to the northwest corner and marked the stake. From

there I went to the discovery point of Malta No. 1, where they were. They started to go to the northwest corner of the other mine, and I followed them but didn't keep up with them. I went along as near to them as I could; I don't know how close, and they went to the northwest corner of Malta No. 2; they went on the
186 east line to the corner of Malta No. 3. I kept tagging on like a little dog as near as I could.

Q. Who put the notice up on the monument of Malta No. 1, notice of location?

A. I don't know; my son or I; I was there.

Q. Did you make a discovery there that day, do any digging?

A. Oh, no; there was a little digging done.

Q. By yourself?

A. No sir; I didn't do any digging.

Q. Who did it?

A. My son.

Q. Where was Swanson?

A. Swanson was there.

Q. Did you find ore in the digging you started?

A. There was mineral bearing ore.

Q. Did you find rock?

A. I don't know; I could not tell mineral rock.

Q. As a matter of fact, do you know there was any mineral bearing rock?

A. Just what they said, there was mineral bearing rock there.

Q. What other discovery monument did you visit that day on the Malta group of four claims?

A. Discovery?

Q. Yes.

A. I visited all of the discoveries.

Q. I will ask you if there was work done at each of these discoveries you speak of, that day?

187 A. Not that day; just enough to set those stakes.

Q. Went down and dug a little and put up a stake and posted notice, is that correct?

A. Yes sir.

Q. How much digging was done on each of those claims that day?

A. There was not a great deal.

Q. What sized holes?

A. I don't think there was much of a hole; there was just enough to consider what they considered a discovery.

Q. Just enough to find there?

A. Just enough to find the iron ore, that you find anywhere there; I do not know any ore, I guess I would not know gold from lead.

Q. After you had been to those discoveries I wish you would state where you went then.

A. I went straight around with them to the corners of those claims. I did not visit all of the corners. I visited the northwest corner of No. 1 and I went up near the southwest corner No. 2 and I kind of circled inside of the lines probably 60 or 80 rods from

the corners of the others coming around near this point you are speaking of a way over east, that rock point. I didn't even go to the southeast corner; my son marked that southeast corner of No. 1.

Q. The southeast corner No. 1?

A. Hold on; I marked that myself; I went to the southeast corner. The furtherest corner I went was the northwest corner No. 1; I went from there north but I didn't go to the corners. My son
188 and Mr. Swanson went to the corners. I never was there before that time. The three times I was there I observed the location stakes. When I came home I came down the grade towards the house. I was not at the blacksmith shop the next day and when I got there found Mr. Swanson there.

*Testimony of Will Sullivan.*

WILL SULLIVAN called and sworn on behalf of defendants testified as follows:

I am a son of A. J. Sullivan and helped locate the Malta No. 1 in 1904. I went up there with Mrs. Tucker and my father on the 31st day of December, 1903. We stopped just below where the Independence mill is, with the teams, and went to the house. Swanson came down the grade to meet us. My father and Mrs. Tucker started to go to Mr. Swanson's house. I took care of the horses and then started and caught them on the ridge. When I got at Swanson's house there was Mrs. Swanson, Mr. Swanson, Mrs. Tucker and my father. Stayed there all night and that night there was a conversation as to the re-location of the old Emma claim. Mrs. Tucker told Swanson she had come up with the expectation of re-locating the Emma group. Swanson took part in the conversation. Mr. Swanson, my father and myself went out to re-locate the claims. From the house we first
189 went to the Emma cabin and then took some stakes, a pick and some location notices.

Q. Then where did you go from the Emma cabin?

A. I went up above the cabin to the point where the snow had blown off, and looked around to see if I could find any formation or ledge.

Q. Did you find any?

A. I found iron formation, iron quartz.

Q. Find any mineral bearing rock in place?

A. Yes sir.

Q. Had anyone told you any portion of the Emma to go to make the discovery?

A. Yes.

Q. Who?

A. Mrs. Tucker.

Q. Did you make any discovery monument that day?

A. Yes.

Q. For the Malta No. 1, I am talking about.

A. That is what we locate——

Q. Is that the first one?

A. Yes sir. Mr. Swanson and myself built the discovery monument. My father went down to the northwest corner and marked the northwest corner post. There was a stake there at that time. Before I got up there, there was a conversation between me and Mr. Swanson as to the boundary lines of the old Emma No. 2. When we started from the house over there we got into the gulch far enough, he stopped there and pointed and showed the lines which he said was the old Emma; he pointed to three stakes in
190 a line running north and south, he said that was the west line of the No. 1 and No. 2 Emma.

Q. Did he show you the entire boundaries?

A. Yes sir.

Q. Which ones?

A. He took me around the claim himself and showed me all of the boundaries.

Q. Did he help you at all in fixing the monument?

A. Yes, he helped me.

Q. Malta No. 1?

A. Yes sir.

Q. Who set the northeast corner of Malta No. 1, or was there a stake there at that time?

A. I think there was a stake there; that is a corner stake; I set the end centre stake myself. The discovery monument was made about 200 feet in a southeast direction from the northwest corner. The centre end stake was nearly half way between the northwest corner stake and the northeast corner stake.

Q. Where did you say you made your discovery?

A. About 200 feet, as near as I remember, southeast of the northwest corner stake.

Q. How far south of the north line of the Malta was it?

A. I think about 50 feet.

Q. Did Mr. Swanson go there with you?

A. Yes sir.

Q. All around?

A. Yes sir. Went to the southeast corner next which was
191 east of the ridge that run north parallel with the claim. Mr. Swanson was with me at that corner, and we marked the stake that was standing there. They were substantially in the ground. The three of us were at the southeast corner, and I don't know who marked that. I was at the southwest corner and there was a south end stake standing there. The southwest corner was marked and there was a stake up. It was marked southwest corner of Malta No. 1. The stakes were four to six inches in diameter and four and five feet above the ground. In going around I never saw any stakes marked Independence No. 2. At that time there was nothing said about the location of the Independence No. 2.

Q. In marking this ground, state whether or not there was any claim made by Swanson to any part of this ground?

A. None whatever.

(BOWEN:) Object to; we will reserve the right to strike it out; I will move later that all of this testimony be stricken out.

A. There was a monument built, a post put up and a notice put in a can and placed in the monument. When we got through marking the stakes we went to the Swanson house and had dinner, and got home that day. I went back there on the 3rd of January, 1904; Mr. McNeil and Arthur Stevenson went back with me. At the discovery of Malta No. — I ran in an open cut for a ways and then a tunnel for about 12 or 15 feet. Was there about a month and then came back to town. I was present at the house the next
192 morning when the location notices were prepared, and there was also Mr. Swanson, Mrs. Tucker and my father. My father wrote the notices and Swanson dictated them. No more conversation than Swanson said he would go and show us the lines on account of being so snowy that Mrs. Tucker could not get around. Was up there last Monday and examined two of the posts and stakes of the Malta No. 1, the southwest and southeast. I saw the survey stakes at the southwest and southeast corners of Malta No. 1 and they were somewhere from 50 to 60 feet north and east from the stake that he told me was the old Emma, at the time of the location Malta No. 1.

Q. State, if during this time there was any conversation between you and Swanson as to his being able to have the claim if he wanted them—wherein Swanson says he might have had the claims if he wanted them.

A. Yes sir.

(BOWEN:) Object to that as immaterial to the issues in this case at the present time.

(COURT:) He may answer.

[Exception.]

A. When we were leaving the stakes and going towards the house he said he could have had those claims a dozen times if he wanted them but that he had all the claims he believed he wanted.

Cross-examination:

Nobody went up to the mine at that time besides us three.
193 When Mr. Swanson, my father and myself went out the next morning three stakes were pointed out to me that were in line along the west line on the Emma group. The northwest corner that I placed was one of those stakes, and the southwest corner was pointed out to me too. We were close to the Emma cabin when I had these stakes pointed out to me, and then he turned around and pointed those stakes out along the east and west. After I had staked out the Malta No. 1, I proceeded to stake out the Malta No. 2, 3, and 4. We made the discovery and put up a discovery monument and from there went over to the southeast corner of the Malta No. 1. Swanson and my father went with me, and then my father and I went down to the southwest corner of Malta No. 1, and then went down to the house. There was from bare ground to probably 2½ feet of snow on the ground. It was about two o'clock when we got back, and left about seven or eight in the morning. We left Hailey in a bobsled that morning; there were two sleds, I in one,

and my father and Mrs. Kettler in the other. I had made my living at mining four or five years prior to that time. Never had been on the ground before 1904 and was there when the location work was done and last Monday. Not to my knowledge there was nothing said by Swanson as to the trend of the veins in that country. There was on the hill the next day. He said it was so broken up he could hardly tell which way it went. I had been over there and made a discovery on each one of those claims that day.
194 Nothing said about the size of the Emma claims or the size of the claims that could be located there. I heard him mention the Independence in the house, but I didn't know anything about the country and didn't pay any attention. I knew the Independence was located in that section. Mr. Tucker told us that Mr. Swanson owned the Independence mine. I did not go into the tunnel or mine that night. Did not hear a discussion about it. My father spoke about being to the mine, and what nice work Mr. Swanson had been doing. The stakes that I located in 1903 and 1904 had no marks on them. I went with my father to the southeast corner stake of No. 1. When I had this conversation with Swanson, that he could have had these claims a dozen times if he wanted to, was coming from the southeast corner of No. 1 to Swanson's house. The stake is probably 300 feet from the house. The house is 300 yards from the west side line of the Malta No. 1. I marked all of the corners of those claims except those my father marked.

Redirect examination:

I was not at the woodpile when they got the stakes. They must have been out there while I was tending the horses. Mr. Swanson rode down the gulch a ways that day and said he was going to Ketchum. I don't know where he went. I am 37 years old and have known Mrs. Kettler, the defendant, seven or eight years. I did the work for her in 1904 and have not worked for her prior
195 to that time nor since. I have lived here in Hailey while she lived in the country. I know her boy, Sam, and we have never been chums. I am a married man, and I don't think Mrs. Kettler knows my wife. My father hired me. Have no interest in the outcome of this suit. I am living at Gooding now. I hardly know Sam Tucker.

*Testimony of Nancy M. Kettler.*

NANCY M. KETTLER, being sworn, testified as follows:

My name is Nancy Mariah Kettler and was formerly Mrs. Tucker. My husband died in 1899 and he was born in Verden, Illinois. We came on Wood river the 10th day of May, 1881; in the eighties we resided on Indian creek about a mile north of here where my husband was engaged in farming and stockraising. I know Mr. Swanson and I think it was in 1875 or 1876 when he worked for my husband in Nevada. We were always considered friends. He always

came to stop with us when he came to Hailey. I don't think I saw him here in 1881. The first I saw him, I think, on Wood river, was in 1883 or 1884. My husband owned interest in what is called as the Emma Nos. 1 and 2 mining claims. He was one of the locators. He bought Mr. Heller out. John T. Sears sold to Mr. Tucker and Mr. Heller and I saw the deeds. I do not know where they are at the present time. I know the deeds are made
196 out to him because he told me all his business. I was up to the Emma claims in the eighties. The deed from Mr. Heller conveyed interest in the Emma No. 2, and deed from John Sears conveyed interest in the Emma No. 1. I have searched for the deeds and have been unable to find them. I know of work that was done on the claims in the eighties both by lease and work done by hired help. I was there in August, 1882. I went up to see my fortune. It was there they found ore on the tunnel they started to drive on No. 1. I saw the ore and they told me it was silver and lead. Mr. Tucker worked the claims up until his death.

Q. Did you, at any time, obtain an interest in the claims?

A. He deeded me the property prior to his death; his health was poor and he deeded me all of the estate and everything.

(BOWEN:) Objected to, unless she has the deed.

(SULLIVAN:) We have the deed.

(SULLIVAN:) We now offer in evidence Book 47 of Deeds of Blaine County at page 122 and ask leave to supply certified copy, and ask that it be marked defendant's Exhibit 2.

(BOWEN:) We object to the introduction of this deed for the reason that it is immaterial, incompetent and irrelevant to prove any of the issues in this case for the reason that it appears to have been a deed dated July 17, 1897, and for the reason that any deed or conveyance or other acts in relation to Emma No. 1 claim or
197 Emma No. 2 claim between the date of the location of the Independence No. 2, 1889, and the location of Malta No. 1, in 1904, are immaterial to any of the issues in this case; it is the same objection that has been made with reference to the work on this claim.

[Objection overruled.]

[Exception.]

A. I think it was.

Q. Did you see the stakes of the Emma No. — mining claim.

A. I did.

Q. Where did you stay when you were up there?

A. Mr. Tucker took me up in the morning and we stayed all day until late in the evening, and got home about eleven o'clock at night, I suppose.

Q. Was there a cabin there at that time?

A. There was.

Q. Where was the cabin?

A. I think it stood a little above where it stands now, near where what they call the location.

Q. Near the discovery?

A. Yes, I saw the stakes; I cannot tell you. May I show you?

Q. Yes.

A. Right down below is what they call the middle stakes between No. 2 and No. 1, and in standing on the dump and looking over you could see the end stake.

Q. That south?

198 A. Yes; this is the east, west, north, south, and then you can see very plainly from the dump.

Q. The northwest corner, you are pointing to the southwest?

A. Southwest corner, in standing on the dump the same as I am sitting here, it would be about the same locality; Mr. Tucker, Joseph Heller and John Sears were on the dump, and showed me the location of the stake over there that they said the other stake was over in the ravine, that didn't show, and away up on the hillside was the other stake; the two claims laid together and the two stakes were down below the cabin, and the location of the cut was hereabout.

Q. Away down there?

A. Yes; there was a boulder there that weighed 200 pounds, if not more. Joe Heller and Sears said I would not have to work any more, but I did.

Q. Was there any ore shipped?

A. Yes.

Q. You know this ground is mineral bearing ground?

A. Yes; there has been ore shipped several times by Joe Heller, by Henry Hendrick and Mr. Tucker and George Havery has shipped ore from that ground.

Q. Did you direct Will Sullivan where to direct the discovery?

A. As near as I could, I told him. I have been up there lately. Mr. Anderson made two surveys of the Malta No. 1. The

199 first one I went up; he would not allow me to go up the hill, he said it was not permissible for a lady to go along with a bunch of men. When we came down from the first survey I had him go back and make another survey. I set one of the posts, that is the location stake on the end of the claim No. 1. I did not see Swanson there in 1882. I never was there until after Mr. Tucker's death, and I had to take charge of the property, and I have been up there since 1899. The only times I stayed on the hill, I stayed in the cabin and at Swanson's. Swanson and I had a good many conversations. I was married to Mr. Kettler two years the 21st of last November.

Q. Now I will ask you whether yourself or Mr. Tucker had worked upon this Emma No. 1 and Emma No. 2, especially each year up to 1903?

(BOWEN:) Object to this question as being immaterial especially as relating to work between 1889 and 1903, and for the further reason that this witness has previously testified and admitted that she was not on the ground from 1882 to 1904, as I recollect the testimony. She was not on the ground during the time the question relates to, and that she could not testify therefore as to what was

being done or what was done by herself or husband on those premises.

[Objection overruled.]

[Exception.]

(SULLIVAN:)

Q. State, if you did.

A. We did. I know there was supplies furnished every
200 year when they were at the camp, beef and hogs killed, and they got cabbage and potatoes. We raised the beef and butter on the farm.

Q. Have you been on the ground in late years?

A. I was.

Q. Were you there in 1904?

A. I was.

Q. Did you see the work that had been done there on tunnels?

A. No sir, I didn't go on the ground in 1904.

Q. Did you at any time near those years?

A. No sir, I don't think I was on the immediate ground.

Q. 1905, 1906 and 1907?

A. Yes sir.

Q. Which year?

A. 1907.

Q. Did you then go over the ground?

A. Not all of it, no.

Q. Did you at any time go over the ground and see the tunnels?

A. I have seen the tunnels, yes.

Q. When?

A. 1907 I was up there, this summer and last summer I was up there.

Q. Did you see the work that had been done there?

A. Yes sir.

Q. State, from what you saw, how many feet, in your
201 judgment, was performed on the Emma No. 2.

(BOWEN:) Object to for the reason that the question does not prove or tend to prove any work which was done prior to 1889 the time of the location of the Independence No. 2, and included work between 1889 and 1904.

(COURT:) She may answer.

[Exception.]

A. I could not say as to that; I am not a miner; I don't know much about mining, but I know I paid the men for the work. They testified they had done it and they received pay.

(BOWEN:) Objected to and move to strike it out as not responsive.

(COURT:) Granted as to the part they had testified they had done it; the rest may stand.

[Exception.]

A. I sent John Smith and my son, Sam, up in 1888 to do the

assessment work. I next saw them the day before Christmas. They went away the next day or on Christmas day. I fix this date because my son had domestic troubles and it was very clearly impressed upon my mind. The assessment work on the Emma No. 2 was not done in 1903 and I had Mr. Jack Sullivan relocate for me the first day of 1904.

Q. I will ask you to go on and state how you came to locate.

A. I had always done the work up to that year. I had not been able to go on account of the illness of my daughter, and I had to relocate to hold it.

202 Q. Where were you in December, 1903?

A. I came from Seattle to Hailey.

Q. What were you doing in Seattle?

A. I went to see my daughter.

Q. What reason?

A. She was sick and had been operated on in the hospital for appendicitis.

Q. What time did you return to Hailey?

A.

A. We went up to Swanson's, I got Jack Sullivan to go along because I could not hitch the horse, dig holes and set the posts. We went to the Independence gulch to the home of Mrs. Swanson.

Q. Where did you see Mr. Swanson that day?

A. We unhitched the team, Sullivan and his son did, and we started up the hill, and Mr. Swanson came down the hill and met us.

Q. What was said, if anything?

(BOWEN): This all goes in without waiving any right to object that we understand we may have.

A. Swanson says "Hello, what brings you up here?" I said I come up to protect and relocate the mines.

Q. What mines?

A. The Emma mines. He says "it is too bad, I would not allow any man to jump those claims over you." Stayed at Swanson's that evening. Mr. Swanson dictated the description. We changed the name at that time. We all went outside and got some stakes

203 from the woodpile and stood on the brow of the hill and looked the canyon over and Mr. Swanson showed the middle stake between Emma No. 1 and Emma No. 2.

Q. Did he dictate the location notice for Emma No. 2?

A. He did.

Q. Did he dictate the location notice of Malta No. 1?

A. He dictated the location of all of the claims, everyone of them. We stood on the brow and he showed us the stake across and he said that was the middle corner stake between No. 1 and No. 2.

Q. Did he point and show you?

A. Yes. He said the west boundary of the Emma went 1500 feet from that stake back to the dump of the Independence what we call the west end of the claim and went 600 feet, 1500 feet back of the cabin and then back to this corner stake. There was no

claim made then by Swanson to any portion of the Emma No. 2. I showed them from the brink of the hill where the old location was. I cannot tell whether Swanson went or not. I never saw them until they came back into the house together about 2:30. I did not see any Independence No. 2 stakes that day. I could see that one stake right below the cabin. I relied upon these actions of Swanson's in making the location. The understanding was that A. J. Sullivan was to locate those claims for me.

We now offer in evidence and ask to have marked defend-
204 ant's Exhibit 3, deed from A. J. Sullivan to Nancy M. Tucker for Malta No. 2 and Malta No. 1 regular mining deed.

(BOWEN:) We make no objection to the introduction of the deed.

(COURT:) It may be admitted.

A. We got to Hailey about eleven o'clock that night. I told Mr. Sullivan to get somebody to go up and do the location work and he said he would get his own son, Will, and I paid Jack Sullivan for that work. I have hired men three years, with this year, to do the assessment work. I have had the assessment work done every year since 1904.

Q. Then you have spent considerable money on those claims since the re-location?

A. Yes sir, I have.

Q. Did Swanson, since that time, ever make any claim on that ground?

A. I never knew Swanson claimed the ground until 1907.

Q. Ever since 1904 Swanson has stood by and allowed you to do the work on Malta No. 1 claim without making any objection?

(BOWEN:) Object to that question as calling for the conclusion of the witness, and the further reason that it is leading.

(COURT:) Overruled. I think it is leading though.

A. No sir, I never knew Swanson claimed any claim; never knew it.

Q. Do you know where the stakes of the old Independence were?

A. No sir, I do not. From Swanson's dump you can see
205 the old cabin on Emma No. 2. The dump is near the house.

Cross-examination:

The first time I remember being on the ground now occupied by the Malta No. 1, was in 1882, and at that time my husband had some interest in the claim. I could see the lines of the claim known as No. 1, which ran north, and also the claim No. 2, which ran south from the cabin. I don't think you could see all the stakes on the north claim from where we stood. You could not see the northeast stake. On the south claim you could see all the stakes excepting the southeast stake. I noticed particularly the way the land run north and south. I knew at this time that the Emma location was the old Emma location was running two claims there. I knew where the location on the hillside was and knew where the southwest corner was. The southeast corner was right in front of the house.

Q. The southeast corner is the one you testified as being over the ridge.

A. No sir, I could not say that.

Q. Did you visit it in 1882?

A. No sir, I don't think I did.

Q. Then you didn't know that corner?

A. No sir.

Q. With the exception of that, you know all the location—all the corners all set?

A. I have been told where they were, I say the one middle stake on that end.

206 Q. How many times in the eighties prior to 1888 were you on the ground?

A. I think once.

Q. That time in 1882?

A. Yes; when I went to see my fortune.

Q. You noticed it so particularly at that time that you could tell in 1907 just where the southwest corner stake stood?

A. Yes sir, I could.

Q. You are positive of that?

A. I am positive of that location, of the direction from the cabin.

Q. That positive opinon in your mind was fixed by something which you say you knew on the ground in 1882?

A. Yes sir.

Q. You were not on the ground then from 1882 until, what year?

A. I have been up there a great many times but not over the ground. I go up to the cabin and go around and look. I have been up there since my husband died.

Q. When was the next time you were on the ground, you recollect from 1882?

A. I cannot recollect.

Q. Were you there at all until after 1889?

A. I don't think so, no.

Q. From 1882 until some time after 1889 you were not on this ground

A. No sir, the next tme I was on the ground, I think, was sometime when we had the bond.

Q. That Tondrow bond?

207 A. Yes. I have personal knowledge what my husband did with reference to doing the assessment work. I know to my own knowledge that during all those years the work was done because I furnished the parties supplies. When I got back there in 1907, I testified to the workings that I saw at that time. Heller had a lease in 1884, in 1885 Mr. Tucker hired the work done, in 1886 it was leased, in 1887 it was leased, in 1890, 1891, 1892, 1893, 1894, 1895, and 1896 it was leased, and in 1897 Mr. Tucker hired the work done, in 1898 and 1899 it was hired. That was the time of Tucker's death.

Q. Mrs. Tucker, you made up your mind to locate these claims or locate the ground occupied by the Emma claims in 1904 for the reason the assessment work had not been done in 1903?

**A. Yes.**

Q. You made up your mind to locate those claims before you left town, did you not?

A. I certainly did.

Q. Took location notices with you?

A. Yes; to have it done.

Q. For what purpose did you go along with Mr. Sullivan and his son?

A. Mr. Sullivan knew nothing about the canyon, knew nothing about the mine; he didn't know nothing about what to do, and I went to show him.

Q. You didn't know anything about the location of the claim or the location of the stakes as I understand you went there for that purpose?

A. Yes.

208 Q. As a matter of fact, you knew at that time where the claims were located, did you not?

A. Yes sir.

Q. In the location of the stakes?

A. Yes sir.

Q. On the corners?

A. Yes sir. I went up there and stayed at Swanson's in merely a friendly way. I don't know that Mr. Swanson and Mr. Sullivan went through the mine that night. When I was there in 1882 I did not know the location of the Independence mine, I didn't know anything about the Independence mine as being located with reference to the Emma. The next morning we all went out of the house and stood there together. Young Sullivan went down to feed his horses. That was after breakfast, and I don't think the sun was up. Mr. Swanson and I didn't get up until after the men folks. The location was drawn up right after breakfast. Mr. Sullivan said to me, how shall I write these, and I says you ask Charlie. After the location notices were drawn up we all went out to the wood-pile, and while there I did not take any part in the discussion. When Swanson pointed the point out to me he didn't give any opinion as to the matter, and then he spoke about the claims running north and south from the center stakes. While I was standing there I don't know that my attention was called to anything else around the neighborhood. I don't remember my attention being called to a cliff of rocks away off to the east some considerable distance.

209 The stakes were prepared before they started off. Seemed to me that A. J. Sullivan had a shovel. I don't know as Swanson had anything, As I stood there Mr. Sullivan took a shovel and young Sullivan took stakes and a pick.

Q. Do you remember any conversation at that time with reference to the advisability of your locating the other way, east and west?

A. No sir, there was nothing said about it that I know of; we wanted to locate the old ground and that was all the order that was given, as I supposed, by Swanson; I relied entirely upon Swanson giving me the correct ground—correct measure.

Q. When you say you relied upon Mr. Swanson, have you not just told me that you knew as much about that as Swanson did?

A. I didn't tell you I knew as much about it.

Q. Didn't you say you knew as much about the location of those stakes? You knew where the stakes were?

A. Yes sir.

Q. As a matter of fact, you went there knowing where the stakes were at that time, and nothing that Swanson said or did to you at that time with reference to the location of those stakes deceived you, did it?

A. Can I explain?

Q. I ask that you answer that question.

A. I know nothing about sections and locations, quarter sections; I knew Swanson did or knew the sakes; I didn't know
210 how to have a notice written off and I knew Charlie did, and I expected him to show us, which he did.

Q. The question was not as to notices or markings on the stake; the question was as to the location of the stakes.

A. Yes sir.

Q. Did anything that Swanson said that day deceive you as to the location of those stakes?

A. No sir, he didn't deceive because he told the truth, as I supposed he did.

Q. You knew the location of those stakes before you went there, did you not?

A. I did.

Q. And the location stakes which he pointed out to you that day were the location stakes on the north end line of the Emma No. 2?

A. Yes it was. May I leave the chair for a moment?

(COURT:) Yes.

(BOWEN:) Q. In 1903, prior to the time you located the Malta No. 1, were you the sole owner of the Emma group of claims?

A. No sir.

Q. Who was associated with you?

A. A man by the name of Richards.

The affidavit that was made in 1908 by Lawrence Tham for work done upon the Emma group in 1903 was an error. We call attention to this proof of labor which we asked to be marked plaintiff's Exhibit E for identifiaction.

(Marked plaintiff's Ex. E for identification.)

I wanted to put this proof of labor on record but he made a mistake.

211 (COURT:) Do you want to offer that?

(BOWEN:) We will have to offer it in our own case unless they consent it be offered now. We will offer it at this time in evidence.

(COURT:) It may be admitted.

Redirect examination:

They told me I would have to have the assessment work put on record to have it lawful, and I spoke to Lawrence Tham. I did

not have anything to do with the drawing of it up. I spoke to Mr. McLeod about having Lawrence Tham acknowledge the work and I think I left the money to have it put on record. There was no work done in 1903. Lawrence Tham did the work in 1901 and 1902 with Ed Rittenour that helped him. I did not see this proof of labor before it was put on record. They went up in the early fall and stayed until late in the spring of 1901 and 2. Tham did not do any other work on any other claim in 1903. Charlie Harkness did the assessment work on Emma No. 2 in 1886. He was up there most of the winter.

(SULLIVAN:) I now offer in evidence page 306 Mining Deed Record of Blaine county, of book 49, showing deed from Nancy M. Tucker to John T. Sears, dated April 18, 1905, conveying an undivided one-half interest in the Malta No. 1, 2, 3 and 4.

No objection.

(COURT:) It may be admitted, and ask to have it marked defendant's Exhibit 4.

212 Q. Did you ever get that interest back again?
A. I did.
Q. How, by deed?
A. Yes sir.

(SULLIVAN:) We now offer in evidence, record of deed of John T. Sears, dated March 2, 1908, to Nancy M. Kettler, conveying one-half undivided interest in the Maltas No. 1, 2, 3 and 4, and ask to have it marked defendant's Exhibit 5.

(COURT:) It may be admitted.

Q. You are now the owner of the Malta No. 1, 2, 3 and 4?
A. Yes sir.

*Testimony of Will T. Drake.*

WILL T. DRAKE called and sworn on behalf of the defendants, testified as follows:

I reside at Hailey and have resided here about 25 years. Am deputy sheriff and knew Lawrence Tham and Ed Rittenour. I saw them working on the Emma mine in the years 1901 and 2. I went up with Tham in the fall of 1901; I don't think I stayed over night. They were working in the tunnel right by the cabin, near the Emma cabin. I went up once in the winter time and stayed over night; Rittenour and Tham were working continuously. I was up in the spring of 1902 and Lawrence Tham came down with me.

213 Cross-examination:

Went up there in the fall 1901 before snow. Lawrence Tham and his brother were there when I went there. The work was being done right alongside of the cabin, as you go up the hill and the cabin is on the left hand side. I guess that would be north. I went into the tunnel. I next went up in the winter some time and the last time I went up there was in the spring.

*Testimony of Mrs. Sarah McFarlane.*

MRS. SARAH MCFARLANE called and sworn on behalf of the defendants, testified as follows:

I live at Hailey and have lived here 22 years, been living here since 1888 on a ranch northwest of town. I know one John Smith, and he worked for me on the ranch in the years 1887 and 1888. I remember Mrs. Tucker coming there and trying to get him to do some work for her; it was about the 2nd or 3rd day of December, 1888. She came twice. He left either the 3rd or 4th. Mr. McFarlane had just put in our winter supplies and in the supplies were a box of raisins; so just after Smith had gone I needed the raisins and when I went to get them I could not find them so Mr. McFarlane went back to the store and told them they had forgot the raisins. Mr. Wellman said he certainly sent the raisins
214 but if I didn't get them he would send me another box, which he did. After John Smith came back he asked me how I liked my raisins. He said when he rolled up his bed he rolled up the box of raisins so they could have them to eat at the mine. He was a man 45 or 46 years of age.

Cross-examination:

Mrs. Tucker asked me if I remember- John leaving for the mine, and I certainly did. I did not have any conversation with her at that time with reference to the time, how I remembered the particular year.

*Testimony of George A. McLeod.*

GEORGE A. MCLEOD being called and duly sworn on behalf of the defendants, testified as follows:

I know Mrs. Kettler and remember an incident of Lawrence Tham filing proof of labor on her behalf. Mrs. Kettler came in and told me that she would have Lawrence Tham come in and file proof of labor. She told me what she wanted him to do and I wrote it down, so when Tham came in I took the notation out and read it to him; he wrote it down and on a blank like this, and he hesitated and said he didn't think that was the year. He didn't
215 think it was 1903. I took this notation down as 1903 from Mrs. Kettler.

*Testimony of Robert Connager.*

ROBERT CONNAGER called and sworn on behalf of defendants, testified as follows:

Live at Ketchum and came there in 1883. Am a brewer and am engaged in mining. I know where the Malta claims are located now and am acquainted with the plaintiff in this case, Charles Swanson. I have got mining claims near the Malta. I got some claims joining

the Malta on the south. I am south of the old Emma claims. I was up there in the vicinity in 1888 and was at the Emma and I met Sam Tucker there right by the cabin. I saw Charlie Swanson near his cabin in 1904. He said Mrs. Tucker was up there and of course we agreed and Sullivan and the boy put up the stakes. He said I showed them the line. That was in April.

Cross-examination:

It was in the spring and I went down from my claim and asked him who put those claims up. He said Mrs. Tucker came up here and re-located. He told me he showed them the line where the line went from the Emma to his side. I said the location work
216 had been done up on the gap. I went over on the Courier side and saw the work had been done. At one time about 1890 I worked for Mr. Swanson. I had a difficulty with him about 1890. We had some trouble over a payment in 1890. I never talked to him until the last three months. Along in 1900, 1902 or 1903 I had the trouble with Swanson. I got a claim to part of the ground that he is occupying, that is the trouble. I know it was in 1888 I saw Sam Tucker because I was up there. I was up there every year. I was up there in 1889. I never saw Sam Tucker in 1889. I cannot tell whether I saw him in 1890 or not. I remember positively it was in 1888 because I was there.

Redirect examination:

The Courier gulch was about 1000 feet from the cabin. The trouble I had with Swanson was because Swanson was trying to get some of my claims.

*Testimony of Ed Rittenour.*

Ed Rittenour called and sworn on behalf of defendants, testified as follows:

I have resided in Blaine county about ten years and know Mrs. Kettler, formerly Mrs. Tucker. Lawrence Tham and I leased for her in 1901 and 1902.

217 (Bowen:) This is under the same objection as heretofore made.

(Court:) Overruled.

We went up there together on the Emma claims. I saw Will Drake up there twice. We took a lease from 1901. Tham came down before me with Drake. I was not up there in 1903. The only year I was there was in 1901 and 1902.

Cross-examination:

I performed labor on the Emma claims. We lived there most of the winter in the cabin. From the door of the cabin we went right into the tunnel. On Emma No. 1 the cabin stood on. The tunnel run in a northeast direction about 80 feet.

Redirect examination:

I think the cabin was on Emma No. 1, of course, I would not say exactly, on the southern claim very near the Independence claim.

Recross-examination:

This was not the tunnel that showed most work done on it. We didn't do any work on the tunnel up above. There was three or four tunnels above the cabin. Most of the work had been above where we were. I was through most of those tunnels.

218 *Testimony of George Havery.*

GEORGE HAVERY being called and sworn on behalf of defendants, testified as follows:

Live near Richfield and have been on Wood river since 1881. I am acquainted with the old Emma No. 1 and 2 ground on Independence gulch, and am also acquainted with Charles Swanson, the plaintiff in this suit, and know Mrs. Kettler, the defendant. I was first on the Emma ground in 1883 and was there before the Independence was located. Joe Heller and a man by the name of Jesse were prospecting with me there. Joe Heller showed me the stakes of the Emma ground at that time. I did work on a claim near there that year, but not on the Emma, and I was up there next in 1883. Joe Heller and John Emery were working there then. I was on the Emma No. 2 ground in 1884 and saw stakes there then; I was working south of it then. I passed the southeast corner stake of the Emma No. — in going to and from my work. It was on the south side of the ridge and the trail was from 125 to 150 feet west of the stake. I have seen the survey stake of the Malta No. 1, 2337, and it is in practically the same place as the stake I saw on the old Emma No. 2. I did work on the Emma No. 2 with John Ward and Sam Tucker by lease in 1889. I worked about a week getting wood and timber for the claim and then worked about a month on the mining claim, the Emma No. 2. It was a tunnel about 175 feet south-
219 west of the cabin, and the cabin had not been moved at that time. I was there next in 1890 and 1891. While we were there in 1889 we did work on the Emma No. 2 to the value of $100.00. In 1890 we worked on the Emma No. 1, and that work would tend to develop No. 2. We did sufficient work then to the value of $100.00. Was there in 1891 and worked on the Emma and on the tunnel that is on the line of the Emma No. 1 and No. 2.

Q. I will ask you if the work you did that year would tend to develop No. 2?

(BOWEN:) All this work in 1890 and 1891 is under our previous objection.

(COURT:) Yes.

Q. Did you do work that year sufficient in value to do the assessment work on the Emma No. 2 of the value of $100.00?

A. Yes sir. The next work was on the Emma No. 1 in 1895 and

that would tend to develop No. 2. Did work sufficient to represent the assessment work on No. 2 to the value of $100.00. In 1896 worked on No. 1 with Vincent Meldon, and did sufficient work to represent the assessment work of No. 2 to the value of $100.00. I was there several months and working all the time. Never did any work after 1896. I don't remember seeing Swanson there only once.

Q. Did you see any stakes of the Independence No. 2 when you were there in the nineties?

A. Yes sir.

Q. Independence No. 2?

A. Yes sir.

220 Q. Where?

A. I saw them north of the cabin, well I saw them all.

Q. I am talking about Independence No. 2.

A. Independence No. 2?

Q. Yes.

A. I saw the Independence No. 2 stake on the southeast corner; I could see that from the cabin door, Independence No. 2?

Q. Independence No. 2.

A. Oh no, I never saw any stakes of it.

Q. Did you see the stakes of the Emma No. 2?

A. Yes sir. You could see the southwest corner stakes from the cabin on the Emma No. 2 and you could see the northern stakes by going out on the dump. I see the southeast corner stake of the Independence No. 1, it was along the southwest corner stake of the Emma mine, it was on the corner of the No. 2, the southwest corner of the Emma No. 2. I had a conversation with Swanson while I was up there in the nineties about the Emma group, and Joe Heller was with me, and Swanson said that Tucker had to work it, and he said he would not mind having a portion of the south end of the Emma No. 2.

Q. Did Swanson at any time make any claim to any portion of the Emma No. 2?

Object- to as immaterial.

[Overruled.]

[Exception.]

A. No sir, he never did. He knew I was working there.

221 I was out there Monday, November 30th and I saw the survey stakes of the Malta No. 1, 2337, and were in practically the same place as the posts of the old Emma No. 2. When I was there in 1889 I did not notice any discovery stake of the Independence No. 2, and if there had been one there I could have seen it from the cabin. I did not see anyone there during that year. Sam Tucker and I went near the west line of the old Emma No. 2, and did not see any stakes there on the Independence No. 2 location.

Cross-examination:

I was on the land in 1883 now occupied by the Malta claims and was prospecting around the Emma. I did not own a claim at that

time by the name of "True Friend." It was in 1884 that I located the "True Friend" and that laid south over the Emma. It laid southeast of the southeast corner of the Emma No. 2. In 1884 I stayed in the cabin and worked the "True Friend." I was not in the neighborhood from 1884 to 1889. I went there in 1889 for the purpose of doing the assessment work. I was not near the Emma ground at any time during that time. I was doing my lease work near the north line of Emma No. 2. There had been ore there. There was no ore there when I was leasing it. I didn't find any on Emma No. 2. I found ore in Emma No. 2 in 1885, 1886, 1895 and 1896. I practically did all of the work on No. 1 with the exception of 1889.

222 During all the time I was leasing I never went around and put up stakes on the Emma No. 2. I could see the southwest corner of No. 2 over on the hillside.

Q. When you testified to this stake being there, you testified to having seen it there from the place where you were working on the other end of the claim?

A. Yes.

Q. Is there not the Silver Bullion and the Little Giant, Independence No. 1 and a number of other stakes that corner is where you saw this Independence—this Emma stake, southwest corner?

A. I believe there was. The conversation I had with Swanson was in 1890 and 1891, which was a general talk in relation to the contour of the country, the ore *and* etc., and said he would not mind having this end of the Emma.

Redirect examination:

Q. You speak of several posts being down near the southwest corner of the old Emma No. 2; was the Emma No. 2 corner south from the southeast corner of the Independence lode, or not?

A. I have always understood it to be.

(BOWEN:) I move that answer be stricken out.

Q. You could see the posts?

A. I could see them from the cabin.

Q. Were the posts of the Emma below the southeast corner of the Independence?

223 A. There were three stakes stood there in a group; I was always told they were the Silver Bullion and Emma and Independence.

Q. Down in near vicinity?

A. Yes; stood all three together.

(BOWEN:) I move to strike out this witness's testimony with reference to the location of the southwest corner of Emma No. 2, for the reason that it appears according to his testimony that the location of those stakes is from what he had been told and not what he knew of his own knowledge.

(COURT:) Motion denied.

[Exception.]

Q. You say one year you worked on the tunnel on the line between the Emma No. 1 and Emma No. 2?

A. Yes sir.
Q. State whether you found the vein there running north and south?
A. No sir, I didn't think we found a vein there.
Q. There in that cut?
A. No sir.
Q. Did you in any other tunnel below there in Emma No. 2?

(BOWEN:) We desire counsel to fix a time if he is going to make a discovery here or a vein, whether it comes after 1889.

Q. Have you examined any tunnel there lately?
A. I did.
224 Q. Did you find a north and south vein in any of them?
A. Yes sir.
Q. What tunnel was that?
A. The tunnel where the cabin now stands.
Q. That running in any direction towards the discovery of the Emma No. 1—Emma No. 2 show running in the direction of the discovery of the Emma No. 2, that would be north?
A. I examined that running south.
Q. Your tunnel was running in what direction?
A. It run in an easterly direction.
Q. You cut into the vein running north and south?
A. Yes sir.
Q. About how far in the tunnel?
A. I judge about 150 feet.
Q. Do you know where the discovery stake of the Malta No. 1 is?
A. Yes.
Q. Was this vein running towards that discovery stake?
A. Yes, it ran towards that discovery.

Recross-examination:

Am a farmer and have done considerable mining. I have not worked at mining for more than two years at a time. Don't pretend to be an expert miner. I do not think that all the veins in that country run east and west. I have been in the Independence.
225 My knowledge as to veins and courses is not very extensive. I went in and examined the vein on the 30th day of November, this year. When they were surveying this tunnel I was asked to go in, and I went in and found the vein running north and south.

### *Testimony of Fred W. Smith.*

FRED W. SMITH, called and sworn on behalf of the defendant, testified as follows:

Resided in Hailey for a little over five years. My occupation is a miner since 1880. My experience first was in placer mining; since 1880 was mostly lead mining in Colorado and have had five years' experience in mining in Idaho around Hailey, Ketchum and above Ketchum. I am acquainted with the plaintiff, Charles Swanson, and have been acquainted with him quite a number of years.

I had a connection with the Independence mine in 1906, and Swanson was there some of the time. I was never shown the Independence discovery; I had a conversation with Swanson concerning it and he said work had been done to such an extent since the discovery that there could not be much told about it. I had a conversation with him concerning where the discovery of the Independence No. 2 was, and during that time he took me to the discovery. It was about 200 feet on the east side of the ridge which divides the two claims, Independence No. — and Independence No. 1. There was a large open cut made into the vein and it
226 carried iron quartz, and there was a big boulder to the right of it. There was a can with a notice inside the can on the stake. There was no other cuts on that slope. The discovery cut was a large cut, and the last time I remember of seeing it was in the spring of 1908. There was a box containing a plat posted close to it. The box was in a northwesterly direction from the cut down the hill probably 30 feet. I performed labor on the Malta No. — in 1906.

Q. Whereabouts did you perform that labor?

(BOWEN:) This goes in under our previous objection.
(COURT:) Yes.

A. On the Malta No. 1.

(SULLIVAN:)

Q. Yes?

A. No sir, not to any extent on the Malta No. 1, as I understood it. I know where the cabin is situated at the present time. The most of the work was performed to the left of the cabin and further up the hill about 300 or 400 feet and the labor was on the Malta No. 2. We ran a tunnel about 120 feet and was worth about $400.00. It would tend to develop the Malta No. 1. At that time there was performed by me labor and improvements on that claim to the value of $100.00 or more for Malta No. 1. There are a number of tunnels on the Malta and Malta No. 2. I have been in tunnels on the Malta No. 1 and 2 and have seen a vein of ore there run in a northerly and southerly direction. This vein has
227 been penetrated by a crosscut and the tunnel turns to the right and runs in the Malta No. 1.

Cross-examination:

I was first on the ground of the Malta No. 1 in 1906. I was there once before that but don't remember anything about it. I had a bond on the Malta in 1906. I had a bond on the Independence at that time. At that time I took a bond on the Independence No. 1 and Independence No. 2. Mr. Swanson did not point out the northeast of No. 1. I could already see that, that was down over the hill on the other side of the ridge. The other stakes that were pointed out were up on the hillside; is the southeast corner of No. 1. At the time I took the bond I understood the Independ-

ence No. 2 laid east of the Independence No. 1 and that those boundary lines were the boundary lines between the two. The large cut was not on the Independence No. 1, it was on the Independence No. 2. The cut is on the east side of the ridge about 150 feet from the crest of the ridge. I saw the government stakes of survey No. 2360.

Q. So you don't know, as a matter of fact, whether the discovery cut which was pointed out to you as the discovery cut, was on Independence No. 2 claim or Independence No. 1 claim at that time?

A. I supposed and expected it was on No. 2. I saw the post and can when I made the first trip to the mine, and before I had taken the bond on it. I cannot fix the time definitely about that.
228 There was some snow on the ridge when I saw the can. I think my option commenced in June, if I remember right. Capt. Lusk was interested in that bond with me. I did not open the can at that time; some time after that I opened it. I had not seen the notice, up to the time he told me that that was the discovery cut, and after that I examined the notice.

Q. What sort of a notice was it, was it partially printed and partially written?

A. Now I could not say as to that; I know it was a common notice usually put in a can; described the ground of the No. 2.

Q. Did it look fresh, could you read it?

A. I read it; read it plain enough, yes.

Q. Didn't look as though it might be 15 or 16 years old?

A. I don't know as to that; I could not tell how old it was; I could read it plain enough.

Q. You know as a matter of experience, that a location notice don't stay out in the weather?

A. This was in a can.

Q. Or in a can for even a number of years?

A. This I could not tell anything about the age.

Q. You could read it very plain?

A. I could read it plain enough.

Q. Is it not a fact that a writing placed in a can that way in the weather does not stay but a few days so it can be read?

A. I cannot say as to that; I have found some a number
229 of years that were in good condition, and some a few years that have not been.

Q. What sort of a tin can was it?

A. I could not tell you what kind of a can it was.

Q. Just an ordinary fruit or vegetable can that had been cut open?

A. Presume so, some such can.

Q. Can had been nailed there with a lid that had been cut open at the top?

A. I forget whether that or whether it had a cover on it, I could not tell you. I remember the can, that is all. I was not very much interested in knowing where the discoveries were on these claims. I never saw the discovery on No. 1. Swanson said it was back of his house. I also worked in the Independence and also worked in

the Malta at different times. There is quite a different character of formation in the Malta than in the Independence.

Redirect examination:

The cut Swanson told me was the discovery of Independence No. 2 had a big boulder at the right. There was no other cuts in the vicinity as large as it.

*Testimony of John Thomas.*

JOHN THOMAS called and sworn on behalf of defendants, testified as follows:

Reside at the Naog mine and have been there three years.
230 Am a miner and engineer and have been such for about 30 years, and am 53 years old. I have mined in California, Idaho, Oregon, Montana and Washington, mostly that covering a period of 33 years. I know where the Independence mine is located. and know where the Malta No. 1 mine is located. I have been on the ground and I know there is a cabin on the ground. I know there is one open tunnel there. I was there first in October this year, and there last this month. The first time, I was in the tunnel and went over the surface some. I have been in only one tunnel, that is close beyond the cabin. I saw a vein there, I considered the formation lime. I found the vein about 120 feet from the portal. It was a north and south vein. We followed the vein about 40 feet one way; the other portion of it was caved, we could look in about 25 feet. It was encountered by a crosscut tunnel and we followed it south. I should judge from the dip of the vein that it would run under the discovery of the Malta No. 1. I know where the discovery post is situated on the Malta No. 1 ground. I should expect the leads to run on the Malta ground north and south. I was up there the beginning of this month and saw a big speckled boulder in the cut, on the Independence ground. I think there was a box east of that I judge about 120 feet. The box contained some patent notice of the Independence No. 2. No other cuts of that size that contained the big speckled boulder. The cut containing the boulder is on the north side of the hill. I could stand at the Malta cabin and see the cut.

231 Cross-examination:

Q. The vein which you speak of having been found in this cut, did it contain——
A. Ore?
Q. Yes.
A. I saw some zinc and manganese of iron.
Q. Did you take any samples or make any assays?
A. No sir.
Q. Did you examine at the discovery post in the discovery cut or hole?

A. On that vein?
Q. Yes.
A. Yes.
Q. Did you find the same formation, find the vein—same vein there?
A. I could not say the same vein; I saw some quartz.
Q. The same character?
A. Hard matter to tell, that depth.
Q. Could you tell whether in place—local rock in place?
A. That hill is broken very, we cannot tell whether it is rock in place, you may say a boulder as large——
Q. It is more from the northeast, is it not?
A. I could not say where it is from.
Q. Then you are testifying as to the character of this formation has particular reference to the west or the north end of the Malta No. 1?
A. As far as we saw the character in that vein in the tunnel, it was about the same.
232 Q. When you are speaking of the general formation and character of the vein, that all has reference to the north end of the claim?
A. We noticed further up the mountain a very large porphyry dike.
Q. That was up the hill, east?
A. East and north.
Q. And the examination which you made of the character, and the testimony which you give with reference to it, had particular reference to that part of the claim and not the Malta claim away over on the Independence?
A. I was looking over the general character of the surface while I was there.
Q. You didn't examine the particular ground in conflict between the two as to the character of the formation?
A. Between the Independence and the Malta?
Q. Yes.
A. I judge them to be about the same.
Q. Broken shale overflow (Gravel?)
A. Yes.
Q. Conflict between the two?
A. Yes.
Q. What sort of an examination did you make of that conflicting area?
A. I just went over the surface.
Q. Just the surface?
A. Yes sir.
Q. You speak of this discovery being 120 feet from what? This cut that you speak of where the speckled boulder was, that is
233 120 feet from what?
A. From this notice about 120 feet.
Q. 120 feet from the notice, box that contained the plat of Independence No. 2?

A. I think so.
Q. You examined that plat, did you?
A. No sir, I didn't read it.
Q. You saw the box?
A. I saw the paper, I knew of it.
Q. You knew it was the usual plat that they post for mining patents?
A. Yes.
Q. That was 120 feet from the speckled boulder cut?
A. No sir.
Q. That is what I asked you; what 120 feet do you mean?
A. Probably I am mistaken; that big cut I think is about 120 feet from the line.
Q. The big cut is 120 feet from the line?
A. Yes.
Q. Between the Independence No. 1 and the Independence No. — or what you understood to be Independence No. 2?
A. I would like to see the map.
Q. I show you defendants' Exhibit 6, being plat, and call your attention to this which is marked No. 1 discovery cut in the Independence unsurveyed claim, being Independence No. 1. I will ask you if the 120 feet measurement you have reference to was from this cut which contained the speckled boulder, over to the line between those two Independence claims, is that the 120 feet measure-
234 ment you mean?
A. Are you referring now from the line over to this discovery cut here?
Q. Yes.
A. I should think that was 120 feet, somewhere about that, I didn't measure it.

(REEVES:) This is not properly re-direct; I ask leave to ask it in chief.
(COURT:) Very well.

(REEVES:)

Q. In your opinion, where does this vein you say you discovered in that tunnel extend with reference to the Malta ground?

(BOWEN:) Objected to as immaterial. We will withdraw objection.

(COURT:) Answer the question.

A. I should judge this vein runs parallel with the claim.

(REEVES:)

Q. In your judgment would it extend clear through and penetrate to the south end line?

Objected to as leading.

A. I think so.

(COURT:) It may stand. (Withdraw the objection.)

(REEVES:)

Q. In your experience you have found veins in place in ground similar situated, have you not?

A. Yes sir.

Q. Could you say that this vein that you have discovered in there after the depth it had taken there, was in place?

A. That is a matter of question.

235 Q. What would be your best judgment?

A. I don't think the vein would be anyways displaced anyways, but the surface may be some.

Q. The surface might be broken up?

A. Yes sir.

Q. On cross-examination you were asked about the big dike lying east from the Malta?

A. Yes.

Q. What is the general course of that?

A. I should say rather northeast; north and south pretty close.

(Witness excused.)

(Recess of ten minutes.)

(Court called pursuant to adjournment.)

(Paper marked Def'ts' Ex. 7.)

(REEVES:) We now desire to offer in evidence certified copy of the affidavit of Charles Swanson that the assessment work was done on Emma No. 2 among others in the year 1895, certified copy of the affidavit filed and recorded in the records of Blaine county, Idaho.

(BOWEN:) We will make the same objection to this as has been made to all other testimony between 1889 and 1894. (1904?)

(COURT:) The objection is overruled. It may be admitted.

[Exception.]

236 (BOWEN:) We object to it for the further reason that the affidavit was not filed within the time provided by law.

(COURT:) Objection overruled.

[Exception.]

*Testimony of A. J. Sullivan.*

I was born in Delaware county, Iowa, on the 10th day of April, 1845, and am a citizen of the United States now, and was at the time the location was made for the Malta No. 1.

*Testimony of Mrs. Cynthia Tham.*

Mrs. CYNTHIA THAM being called and sworn on the part of the defendant, testified as follows:

Live at Hailey and am the widow of Lawrence Tham. My husband died the 23rd day of October, this year, at Hailey. I was formerly Mrs. Davy, and he died in 1903. Lawrence Tham went to work on the Emma claims in 1901 and 1902. He left in the fall

of 1901 to go up there. Jim Davy took him up; Mr. Tucker hired him to take him up. Ed. Rittenour went up with Lawrence Tham. My husband came back some time in the night. I saw Tham when he returned in 1902 at my house. My husband died on the 15th of February, 1903, and Tham was in town that day because he was at my house that night. He was working at the News-Miner
237 for Mr. Richards. I married Tham in 1906. I saw him in 1903. He was not at the Emma claims in 1903.

Cross-examination:

In 1903 when my husband went up there I didn't go with him; all that I mean, Tham started for there or was supposed to be up there. I knew where Tham was pretty near every day in the year 1903.

*Testimony of Nancy M. Kettler.*

I was born in Owen county, Indiana, in 1849, and was a citizen of the United States when the Malta No. 1 was located, and am at the present time.

(BOWEN:)

Q. You speak of being the owner of the Malta-Emma group in the year 1888; were you the owner of any other claims at that time?
A. I was not.
Q. Was Mr. Tucker?
A. Not that I know of, no sir.
Q. Your husband's name was S. M. Tucker?
A. Yes sir.
Q. I will ask you if he was not the owner of the Julia lode?
A. No sir, he was not.
Q. In 1888?
A. No sir.
238 Q. Do you remember about such a location?
A. No sir, I do not.
Q. Do you remember about the Mable Queen lode located in 1888?
A. He was not.

Objected to as incompetent, irrelevant and immaterial.

(SULLIVAN:) Move to have it stricken out.
Motion denied.
[Arguments.]
(SULLIVAN:) We have shown by witnesses that they did the work on these identical claims right through for each year. We move to strike out the witness' testimony in regard to other claims.
(COURT:) I will grant the motion.
[Exception.]

*Testimony of William Dukring.*

WILLIAM DUKRING being called and sworn on behalf of defendants, testified as follows:

Reside at Pocatello and am 27 years of age and have been a civil engineer for about six years. Received my technical education at the Washington University in Washington. I have had the past nearly six years continuous experience and in the summer about four years prior to that. I made the map which you show
239 me and marked Def'ts' Ex. 6, and gathered the data secured myself and from data from the official map of survey 2360, the official survey then of the Independence No. 2. The line running north and south from figure 3 to 2 is the west line of survey 2360 Independence No. 2. I located the cut from these stakes which are on the ground, stakes No. 2 and 3. The cut marked No. 1 is 64 feet from the west end line of the Independence No. 2, the shortest distance. The distance from the west end line of the Independence to the west side line of the Malta No. 1 is 114 feet; that 142 feet is from the west end line to the cut marked discovery cut. The last time I was on the ground was November 30th. The cut marked No. 1 is the largest cut in the neighborhood; it is practically 40 feet from the opening of it to the face of it and it is the one containing the quartz boulder. Between the west end line of the Independence No. 2 and the west side line of the Malta No. 1 I found no cuts. The other discovery cut marked No. 2 is 28 feet east of the west side line of the Malta. The other cut south and west of the cut just mentioned is about 24 feet to the center from the west side line of the Malta No. 1. The other cut still east and a little north of this last cut is about 68 feet from the west side line of the Malta No. 1. South of the last described cut and east there is another cut which is 90 feet from the Malta west side line; and then still east and a little north there is another cut which is 165 feet from the Malta west side line, and still east there is another cut which is
240 200 feet from the Malta west side line, and still east there is another one which is 400 feet from the Malta west side line, and then still further north and east there is another one which is 575 feet from the Malta No. 1 west side line. Taking the first cut east of the west side line of the Malta, the next cut nearest it would be about 35 or 40 feet southeast, and still going east the next cut to that 25 feet, and the next cut from that 75 feet, and the next from that 30 feet, and the next 200 feet. Taking the cut that is nearest on the east side of the west side line of the Malta No. 1 the distance from that to the closest cut west is 131 feet. The cabin is the cabin on the north end of Malta No. 1 and it is near the mouth of the tunnel shown about 150 feet from the northwest corner of Malta No. 1. The mark near the north end line of the Malta No. 1, marked discovery cut, is the location cut near which the location notice of that claim was put. The dotted line that runs in a southwest direction, being marked 1620 feet and points to another mark marked mill, is the bearing of the discovery cut of the Malta No. 1

to the mill of the Independence mine. The other dotted line that runs in a southwest direction, marked south 64 degrees, 20 minutes west 1520 and points to an object marked dwelling, is the distance from discovery cut on Malta No. 1 to the dwelling belonging to the operators of the Independence mine. When I was on the ground I observed a box containing the official plat of survey 2360 of the Independence No. 2. The box is 64 feet west of the west
241 end line of the Independence No. 2 on the old Independence ground. When I was up there in November I made a partial survey of this tunnel near the Malta cabin, with Mr. Thomas, and observed a vein of ore running north and south in there. I found the general course of the ledge to be north and south.

Witness handed small plat marked "Sketch of Independence No. 2" and asked to state what it is. In reply stated that it was a sketch prepared by him from notes shown in the official survey No. 2360. In addition to the notes shown in the survey he had been shown the boundaries of the claim which would extend to the location stakes east of the Independence No. 2 as surveyed under 2360. Whereof such sketch was offered in evidence and received by the Court and then marked Def'ts' Exhibit 8.

The cut by the speckled boulder marked the No. 1 discovery is east of the backbone on that spur close to 60 or 70 feet. There are cuts on the Independence ground west of this cut, the nearest being about 65 feet and there are two more near there. There is no stake at the point on the Independence No. 2, 142 feet east of the westerly side line.

*Testimony of Harry J. Allen.*

HARRY J. ALLEN being called and sworn on behalf of the defendants, testified as follows:

I was born in England but am a citizen of the United
242 States. Was naturalized in the District Court in Chicago. I took out my first papers in Chicago when I was about 14½ years old. My brother made me take them out.

Q. When were your second papers issued?

(BOWEN:) We object to it as immaterial, as not proving or disproving any of the issues of this case. I do not see what this witness can have to do with the case.

(BRODHEAD:) They have introduced an adverse claim in which this witness appears to be the affiant in which he swears he is a citizen of the United States. We maintain we have a right to go into these papers everything set up in the affidavit.

(COURT:) You may proceed.

[Exception.]

A. They were not issued. I was not 21 when I came here, was only 14½ years old. My first papers were taken out in 1868 or 1869. My father nor mother were not naturalized, but I claim to

be a citizen of the United States. I have not my first papers with me but I can get them. I have sometimes voted, but not lately.

(BOWEN:) We move to strike out this testimony at the present time for the reason that it is immaterial, irrelevant and having no bearing upon the issues of this case.

Said motion was taken under advisement.

243 Thereupon the defendants offered in evidence record of deed found on page 122, book 47, Records of Blaine county, Idaho, purporting to be deed from S. M. Tucker to Nancy Mariah Tucker, dated July 17, 1897, to which the plaintiff objected on the ground that it related to a transaction that occurred between January 3, 1889, and the time of the location of the Malta No. 1, which objection was overruled by the Court and the deed admitted in evidence.

Exception by plaintiff.

Whereupon the defendants offered in evidence proof of labor upon the Emma No. 2 for the year ending December 31, 1906, found in book 3, Proofs of Labor, page 181, Blaine County Record, also proof of labor for December 31, 1897, in book 3, page 284; also for the year ending December 31, 1898, page 405, book 3; also for the year ending December 31, 1889, in book 3, page 453; also for the year ending December 31, 1900, book 4, page 53; also proof of annual assessment for the year ending December 31, 1906 upon Malta No. 1, book 5, page 65 records said county.

To which offer the plaintiff objected for the reason that it was labor done between the date of the location of the Independence No. 2 and the location of the Malta No. 1, and do not prove or disprove any of the issues raised by the pleadings of this case. And the same were admitted in evidence and marked as Defendant's Exhibit E.

Objection overruled.

Exception by plaintiff.

244 WILLIAM DUKRING testified as follows:

Cross-examination:

Survey lines may run on a level and in measuring 1500 feet we do not take into consideration the contour of the country. 1500 feet along a hill would not be 1500 feet measured horizontally. The measurements which I made from the cuts to lines or other cuts was made in the same way, that is, horizontal measurements. The distance from the large cut on No. 1 to what is marked discovery cut on the Independence No. 2, according to the survey of Mr. Anderson, No. 2360, is 142 feet. The distance between the discovery cut on Independence No. 2 and to the nearest cut east on the lode line is approximately 130. These cuts were old cuts and had a bunch of choke cherry bushes near them, I think, just growing a little below.

Redirect examination:

I made my measurements according to standard recognized rules of survey. In determining the west end line of Independence No. 2, I checked the location over of No. 1. I was able to use the distances and course shown and from the stakes of No. 1 triangled these cuts, also established the point on the side line of Malta No. 1 from which I took courses and distances from these points.

245 Q. On cross-examination Mr. Bowen asked you the height—that is, the difference in elevation of the west side line of the Malta No. 1 and the cut marked on that map as discovery cut No. 1; you recollect that, do you?

A. Yes sir.

Q. You stated it was about 10 feet?

A. Yes about that.

Q. What would be the difference in making a horizontal measurement between those two points and making a surface measurement?

A. You want that approximately?

Q. Yes, approximately; take a little time and figure it up; you might give it exact.

A. Five feet each in elevation is about two-tenths feet——

Q. Two-tenths of what?

A. Of a foot; and 64 feet would be probably approximately about four-tenths to three-fourths to a five-foot raise, not over a foot on a ten-foot raise; that is not exact, it is probably close to a foot.

Q. On that basis, what would be the difference between those two points on the horizontal measurement and the surface measurement?

A. The horizontal measurement would be in the neighborhood of a foot less than the surface measurement.

(REEVES:)

Q. Is the west end line of the Independence No. 2, as shown upon that map, a correct representation as it exists on the ground according to the official survey stakes set up by Mr. Anderson in making survey 2360, Independence No. 2?

246 A. Yes; I checked the west end line of Independence No. 2 and the stakes were as nearly correct as they would have to be to have the survey correct.

The plaintiff here moved to strike out all the testimony offered on behalf of defendant relating to the location of the Malta No. 1 claim for the reason that it does not appear that the location was made upon the ground which was vacant and unappropriated with reference to the particular area in conflict between Independence No. 2 location and Malta No. — location as set forth in the pleadings in this case, and for the reason that the testimony offered relates to the location which is subsequent in point of time and right to the Independence No. 2 location.

Motion denied, to which ruling plaintiff excepts and still excepts.

Whereupon plaintiff moved to strike out all the testimony offered on behalf of defendant relating to conversations and act of the plaintiff, Charles Swanson, on the first day of January, 1904, and

particularly all the testimony of A. J. Sullivan, William Sullivan and Mrs. Nancy M. Tucker, for the reason that their testimony is immaterial and for the further reason that it does not support the allegation as set forth in defendant's plea of estoppel, it does not raise any estoppel as against this plaintiff.

Motion denied.

Plaintiff excepted and still excepts.

Whereupon the defendants rest.

247 ERIK ANDERSON recalled on rebuttal testified as follows:

In 1888 I resided on the Independence with Mr. Swanson and wife. The house, when I lived there, was farther up the hill than it is now. It faced the Independence gulch. We had a view from the house all the way down the canyon. Could not see the Emma claims exactly from the house but you could just a few steps east and from that point you could see all of the Emma claims. I was not out of the house in 1888 except to go down town after the mail. I was working in the mine at that time. I was right there during December, 1881.

Q. I will ask you if during the year 1888 you had observed whether or not anyone had performed or was performing any labor upon any part of the Emma claims during that year?

(REEVES:) Objected to as improper rebuttal; that was for them to go into in chief.

(COURT:) I will hear you.

[Arguments.]

(REEVES:) I want to amend my objection a little.

(COURT:) Very well.

(REEVES:) I object to the offered evidence upon the ground that it is improper rebuttal and that it is an attempt to prove a forfeiture of the Emma No. 2, and no forfeiture is alleged in the complaint.

[Objection overruled.]

[Exception by defendant.]

248 A. Yes, I helped do a little labor on the claim in 1888. In the month of May, 1888, I went with one of those Cornishman and jigged the ore. There was no work done upon the Emma claims or either of them during the year 1888. In 1888 I was particularly interested in watching what they were doing on the Emma claims, particularly the south claim of the Emma in the year 1888. If there had been anyone living in the cabin in 1888, I would have known it. There was a man stopping in the cabin between December 28th and January 2nd, 1889, and with the exception of that person there were no other persons living there. He left there on the morning of January 2nd and left towards Courier gulch. I saw him going to the cabin on the 29th. He came up Independence gulch, and that is the only way. He came on foot. I saw him between the -2th and the 2nd of January. I was at that cabin on the morning of the 2nd of January with Mr. Swanson. There were indications of tracks which went to the Courier gulch. The next day I made my location of the Independence No. 2, and Mr. Swanson and Mr. Warren were with me.

With the exception of the work which I and the Cornishman did in 1888, there was no work done on the Emma claims or either of them during that year. I had reasons for watching the claim and the performance of work done in or during 1888, and particularly December, 1888.

Cross-examination:

I was not close to the man, I saw him at a distance, looked
249 at him with my naked eye. I didn't measure his tracks. They were normal size. I am 53. The man went up to the Emma cabin. The distance to the cabin from the house must be 1000 feet. I am a brother-in-law of Swanson's and am very desirous of seeing him prevail in this suit. I measured the Emma line during the summer of 1888.

Q. You say at one time you measured the Emma line, what time was that measurement made?

A. That was made during the summer of 1888.

Q. What time in the summer?

A. I don't just remember; it was during that season.

Q. That is as near as you can get at it, that it was during that season?

A. Yes sir.

Q. What kind of a tape did you use?

A. Just an ordinary tape, an old tape, I think a foot or two of it gone off one end of it, if I remember right.

Q. What was it, a 100 foot tape or a 50 foot tape?

A. Really, I don't remember.

Q. Was it a cloth tape?

A. Cloth tape.

Q. An old tape?

A. An old one, yes.

Q. You and Mr. Swanson measured it?

A. Yes sir.

250 Q. Which end of the tape did you carry, the front or hind end?

A. I don't remember that; pretty hard to remember little details. I don't believe I went to town once during the month of December. Bob Warren got there on the morning of the 3rd of January, 1889. I am residing in Colorado now. We measured off the Independence No. – 1500 feet. I walked down to Ketchum on January 2nd and came back the morning of January 3rd. The Independence was located later after Warren came back with me.

Redirect examination:

We were at the Emma claims on January 2nd and went down to Ketchum that afternoon, and came back on the 3rd, and the Independence was located that day; and went back to Ketchum and came back during the day of the 4th. I heard the conversation of Mr. Heller in relation to the conversation with me in regard to the Independence stakes being in on the Emma ground, and since then my memory has been refreshed. I went to Popham Bros., who were

the locators of the Independence and who were still interested with us, and told them there was a complaint that had been brought to my attention in regard to the stakes of the Independence and that they were on the Emma ground, and they promised they would go and see the Emma people and have that fixed up. One of the Popham Bros. and one man from the Emma were re-estab-
251 lishing the line one afternoon. That line had nothing to do with the testimony which I gave about the drawing in of the Independence No. 2 lines in 1889.

Recross-examination:

Popham, the original locators, estabished that line together with the Emma people.

Q. You drew the stakes in twice on the old Independence, did you?

A. Yes; I didn't do it. Excuse me for answering that so quick.

Q. Did you se them establish it?

A. Yes; I was not close to them but I saw what they were doing, and took it for granted.

Q. You thought they were moving the stakes?

A. I took it for granted they were fixing it to the satisfaction of both parties.

Q. The stakes were established by a representative from the Emma and the Popham Bros., who had an interest in the Emma at that time?

A. Had an interest, yes.

Q. When you went and located the Independence No. 2 in 1889, you drew the stakes in again?

A. I drew the stakes in, or Swanson and I did wherein to conform with the record of the Independence No. 1 so as to make it right. It stated at the discovery that it was claimed 100 feet east and so many feet west, and we knew we had too much ground, so we done that in order to throw in with the Independence No. 2.

252 CHARLES SWANSON called on rebuttal testified as follows:

I am a native of Sweden and my name spelled in Swedish would be Svennsson. First name is Carl and my middle initial is G. I declared my intention to become a citizen of the United States in 1869 at Omaha, Douglas Co., Neb. I was naturalized in Lake county, Colorado, in Sept., 1874. I lived during the year 1888 on the Independence property. I lived then about 400 feet up the hill from the house that is now on the property. During the entire year of 188– I was living on that property, and my wife and Erik Anderson were living with me.

Q. Did you, during the year 1889, observe whether or not the annual labor or any labor was being performed upon the Emma No. 2 or either of the Emma group?

A. What year?

Q. 1888.

A. I did. A few steps to the northeast from the house you could see the Emma cabin and pretty much all the territory. I went out

there probably once or twice a day. In December, 1888, I noticed some one living in this cabin. In May, 1888, two Cornishman came up for the purpose of jigging some ore. There was no one there working on those claims in December prior to Christmas. On the 29th of December I saw a man at the Emma cabin, but on the 2nd of
253 January I did not see him. Erik Anderson and myself walked over to the cabin and in so doing we discovered some tracks before we got up to the cabin leading over across the hill to the southwest. We went to the cabin on the morning of January 2nd, 1889, and the cabin was locked; there was no one in the cabin, and then we went to the workings; there were some tracks leading to the workings but we could not discover anybody around about the tunnel. We were on the Emma claim the following day with Erik Anderson and Robert Warren. Did not see this man at any time in January after that. Prior to the location of the Independence No. 2, I took measurements of the Emma locations for the purpose of determining its length as staked upon the ground from the north boundary lines of the Emma No. 2, in company with Erik Anderson.

Q. I will ask you to state whether or not you had any reasons for making such measurements?

(SULLIVAN:) Objected to as immaterial. He testified he did measure it.

(COURT:) I think so.

A. There was a reason.

Objected to.

Sustained; to which plaintiff excepts.

(BOWEN:) We offer to prove by this witness that the reason we had for measuring this was because he thought the Emma location was too long, and desired to find out, so that he could make a location in 1888 on the ground lying east of the Independence No. 2.
254 (COURT:) I don't think that is admissible; it cannot add anything to the fact. The proffered evidence is rejected.

Plaintiff excepts.

The distance from the north end line of the Emma No. 2 to the south end line of the Emma No. 2 was 1200 feet. I remember the occasion of A. J. Sullivan, William Sullivan and Mrs. Kettler coming to my place on December 31st, 1903. Sullivan told me he came up there for the purpose of locating the Emma ground. I told him by locating those claims—changing those claims and instead of running them north and south, run them east and west and there was plenty of territory there for four claims, and I informed him if there was such a thing as a vein in this ground, the vein will certainly run parallel because the other veins in that vicinity run east and west. I told him by running them east and west he would have four full claims. This conversation was right in our house. It was shortly after breakfast. Mrs. Tucker asked me if I would not go with Sullivan and put up those stakes, as her time was limited. I told her, as far as assisting putting up those notices, I could not assist them any; I would not have anything to do with it and then I ran into the mine and brought my tools out and

sharpened them. I informed them I could show them the centre ends of those four claims, the northeast corner of No. 1. I was right north of the house when I had the conversation when I pointed out the corners, right near the woodpile. I pointed out
255 to them the northwest corner of Emma No. 1, also the northeast corner of the Neighbor and the northwest corner of the Emma No. 2. There was only one more stake that you could see and that was the northeast corner of Emma No. 2. At that time I also pointed out my lines. I pointed out the north side line of the Independence No. 2. Told them I could not see the northeast stake of the Independence because that would be over the ridge. I showed them the cliff of rocks over the east and explained to them that this stake was in a due line from those rocks. South of the house you could see Independence No. 1 corner, the southeast corner and I pointed that corner out to them also. That is the same corner as the southwest of Independence No. 2. I did not point out to them any stake in that neighborhood as being the southwest corner of the Emma. If a person were to go down the dump in front of my house he would be going to the west. I did not on that day go over and help Mr. Sullivan or his son or either of them locate any corners or make any markings or make any discovery or erect any posts on the Emma No. 2 or either of the Emma. After Will Sullivan came back on the hill with his bunk, provisions and etc., he asked me if I would show him the side line, the west side line of this group of claims, and I promised that on a certain day I would do so, and I did probably after eight or ten days after the location was made. We went upon the north, that is, the north hill called the Baltimore hill, and I told him the corner
256 would be in the neighborhood, that was the northwest corner of the No. 1 Malta. I could not direct to that corner exactly but I found the west side line of these claims that I wanted to show him, and after getting up there and taking sight you could see the corner between the two Maltas, and also I had my line on the other hillside, that is the Independence hill; so that I had three distinct points to sight from and by so doing I could locate this side line clear through. There was no stakes on the south hill, that is the Independence hill, nor was there any stakes on the north hill; the only stake was the stake between the two Malta claims on the west side line. Will Sullivan also packed short slab stakes with him; and from this corner we walked up to the center of No. — claim and walked over and around the hill and put up a stake on the northeast corner of Malta No. 1. I did not go with Sullivan to put up any other stakes. As we were coming back we walked around on the granite point here and as we dropped around near the side line to where the holes were, and I explained to him that these holes were along the side line, and I explained to him where the north side line of the Independence was, explained to him that the snow covered the stake and that it was impossible to say just where it was at that time. He was carrying a little twig in his hand, and he shaped it off with a knife and marked it to stick it in the snow right there. I told him this line would be a little more up hill or

down hill, I could not tell, that is, the north side line of the
257 Independence No. 2, and that is all I did with reference to assisting him. I saw Mr. Will Sullivan and the elder Mr. Sullivan after I talked with them at the woodpile. They came to the shop where I was doing work, and we went over for dinner. Before the location notices were drawn up, I made a diagram and showed them how short these claims would be to the south. Mr. Jack Sullivan drew the location notices, and I never had a thing to do with the dictation of them. In September, 1895, I leased and bonded the Independence group to a man by the name of G. B. Tondrow. I was his superintendent in charge of his work. He told me that whenever I made the affidavit for the work being done on the Independence to also include the Emmas, which I did.

Book 3, Agreements and Contract Records of Blaine, formerly Alturas county, at page- 407, 408 and 409 and 410, being contract bond and lease between Mr. Swanson and Tondrow relating to the Independence group of claims, offered in evidence.

(REEVES:) Objected to as incompetent and irrelevant and immaterial for any purpose.

(BRODHEAD:) The Emma claims are not included in this agreement.

(COURT:) It may be admitted for what it is worth.

The cut that has been testified to with the big speckled boulder in it is the discovery cut of the original Independence. I have seen the box that has been testified to as being near this large
258 cut, six or seven days ago, and that is the only time I have seen the box; it was placed there while I was out of the state. The discovery of the Independence No. 2 was 200 feet east of this large cut.

Cross-examination.

(REEVES:)

Q. When you were out of the state of Idaho, Mr. Allen was your attorney in fact by duly executed instrument, was he not?

A. Yes sir.

Q. You gave him full authority to represent you in all matters pertaining to the Independence No. 1 or the old Independence and Independence No. 2?

A. In this contest suit?

Q. All matters in connection with the contest suit—adverse suit?

A. Adverse suit, yes.

Q. Part of that was making application for patent, was it not?

A. Yes sir; and also for every thing pertaining to this matter.

Q. How is that?

A. Everything that pertained to this matter, me being absent, the adverse claim and also in the patent.

Q. He had power of attorney to represent you in applying for the patent for Independence No. 2?

A. Yes sir.

259 Q. You say you could see the northeast corner of the Emma No. 2 from your house?

A. Yes sir.

(COURT:) The southeast corner?

(REEVES:) That is what he testified to.

A. The southeast corner of the claim.

(REEVES:)

Q. Of Emma No. 2?

A. That is right.

Q. Did you see John Sears go up to the mines—Emma mines in 1889?

A. I did not.

Q. Did you see him any time while he was up there in 1889?

A. I never he was in the state of Idaho at that time.

Q. Did you see anybody go up there in 1889?

A. As to that I cannot say, might be.

Q. Whom did you see go up there in 1886?

A. In the spring of 1886—I was thinking about 1896?

Q. 1886?

A. I don't remember of seeing any particular one going up there in that year.

Q. Whom did you see going up there in 1885?

A. I could not say in 1885.

Q. Who did you see go up there in 1884?

A. I think I saw John Sears and Joe Heller, in 1884.

Q. About what time of the year?

A. It was during the spring and summer; I may have seen them several times.

260 Q. You may have, but did you?

A. Yes sir, I did.

Q. How many times?

A. Well, I could not possibly say how many times, as I know they were at work at the Emma claim on the northern claims. I know they were extracting some ore that summer.

Q. When did you see John Sears and Joe Heller?

A. Over on the Emma No. 1 where they were extracting this ore at that time that summer or spring.

Q. Can you recollect what time of year it was, was it in the spring or summer?

A. I remember in July they were there.

Q. Do you have a distinct recollection of seeing, Joe Heller and John Sears there in July, 1884?

A. I remember Joe Heller very well because I had a man that was working in the Independence, went over in the month of July for the purpose of examining——

Q. That is not an answer to my question. I just asked you if you remember of seeing him up there in the month of July, Joe Heller and Mr. Sears, in 1884?

A. Yes, I am positive of that.

Q. You are as positive of that as anything else you have testified to?

A. I remember especially about Heller, I saw him that spring.
Q. That don't answer my question.
A. The first part of the summer.
261 Q. This question ought to be answered categorically.

(COURT:) Answer it, yes or no; are you positive of that testimony?
A. Yes.

(REEVES:)

Q. Who did you see go up there in 1889?
A. I don't remember.
Q. Who did you see go up there in 1890?
A. I don't even that year remember that I saw anyone particularly.
Q. Who in 1891?
A. I think that Joe Heller—I think he had a lease in 1901 and 2—winter of 1891 and 1892, on the Emma.
Q. Did you see Joe Heller go up there in 1891?
A. You mean come up through the gulch?
Q. Yes, going to the Emma mine.
A. I would not say that I saw him coming up that gulch, but I saw him around the premises.
Q. Who did you see with him; anybody?
A. No, I don't remember who was on the ground there, there might have been somebody else on the ground, I don't remember who was with him.
Q. Who did you see up there in 1892?
A. I saw Joe Heller in the spring or through the winter of 1892.
Q. I am speaking of the year 1892. Did you see Joe Heller there in that year?
A. I did.
262 Q. Who else did you see there in 1892?
A. I don't remember who was his partner that year.
Q. You are testifying more from the fact that you think they had some kind of a contract up there that from your recollection of having seen them go?
A. May I explain that?

(COURT:) Answer the question, yes or no.
(Question read.)

A. I think they had a contract, yes.

(REEVES:)

Q. You are testifying from that fact rather than from your recollection?
A. Yes.
Q. Who did you see up there in 1893?
A. A fellow by the name of Hendrick.
Q. What time was he there?

A. He was there through the winter and spring.
Q. Do you mean through the winter of 1893 and spring of 1894?
A. No.
Q. I asked you about 1893, that is what you understood, was it?
A. I know he was there in the winter of 1893, also continued to the following July.
Q. Then you saw Hendrick in the winter of 1893 and July of 1894?
A. No sir, it cannot be that.
Q. That is what you said, is it not?
A. You may call this the winter of 1892 and 1893.
263 Q. I didn't ask you about 1892, you are testifying about 1892. You misapprehend, it is 1893 I am asking about.
A. This was in January, February and March.
Q. Of 1893?
A. Yes.
Q. That you saw Hendrick there?
A. Yes sir.
Q. Who did you see in 1894?
A. I seen Joe Heller.
Q. What time?
A. In the fall.
Q. Was anybody else up there that year?
A. Yes; I have seen Sam Tucker.
Q. 1894, what time of the year?
A. In the fall.
Q. How do you pronounce your name spelled in Swedish?
A. Pronounce it?
Q. Yes.
A. Svenson. (?)
Q. How do you pronounce Carl?
A. Karl. (?)
Q. It is Carl Svenson; when translated from the Swedish into the English language, Charles Swanson?
A. Yes.
Q. Where was the man when you first saw him come up the gulch, that you spoke of in the very late days of December, 1888?
A. Passed very close to the mouth of this gulch, which is called Independence.
264 Q. Were you and Mr. Anderson both keeping vigil at that time?
A. Yes, it was about noon and when we were home for our dinner.
Q. Well, you were both on the lookout down the road?
A. Specially when there is snow on the ground you can see every object that is dark.
Q. The question is, were you and Mr. Anderson both out there looking for somebody coming up the road at that time?
A. No, I don't know about that, but I remember I saw him.
Q. Anderson was with you, was he not?
A. We were at the house at the time when we saw him.

Q. You both saw him about the same time?
A. I would not say that.
Q. After you saw him, you both watched him, did you not?
A. We did.
Q. You talked about where he was going?
A. Well, we really had no idea who he was or where he was going; he might have come up our way or might have gone over the saddle on the east fork.
Q. When you saw him, you talked about it?
A. Yes sir.
Q. You have a distinct recollection of that?
A. Yes sir.
Q. Where did you conclude he was going?
265 A. We had an idea probably he was somebody who was coming up to visit us, or probably some friend, or somebody looking for trouble of some kind.
Q. In 1904, you and Mrs. Tucker were good friends, were you not?
A. Well, we had no falling out that I know of, meeting always pleasant.
Q. You used to be a member of the Tucker family in Nevada; with them a long time?
A. I was not.
Q. Did you know them down there?
A. I knew them, because I worked for Mr. Tucker a short time.
Q. How long?
A. About ten days.
Q. What time of day was it when you saw this man coming up the gulch?
A. Probably noon.
Q. Then you saw him go on up to the Emma cabin?
A. After he passed our grade, why we noticed that he took a course for the cabin.
Q. You were watching to see if he went up to the cabin, were you not?
A. Surely.
Q. You and Anderson were both watching?
A. I think we were.
Q. Anybody else watching him?
A. I don't think my wife was watching him.
Q. You and Anderson and your wife were all there were there?
A. That is all.
266 Q. You say you went over to the Emma cabin on the morning of January 2nd?
A. Yes sir.
Q. Observed some tracks there?
A. I did.
Q. I believe you stated on direct examination that there were tracks going to and from the work?
A. There were some tracks around about the house and there were also tracks to one of those tunnels near by.

Q. Did you particularly observe the size of those tracks?
A. I did not.
Q. Not able to state whether they were tracks of a man with a small foot or a large foot?
A. No sir.
Q. Do you know who the man was?
A. I do not.
Q. Did you attempt at the time to make any inquiries?
A. He came over the same afternoon, the first day he was there, and borrowed an ax from my wife, after we went to work on the ground.
Q. Did you see him when he was over there?
A. I did not.
Q. The reason you know he borrowed an ax from your wife was because she afterwards told you so, was it?
A. Yes sir.
Q. You didn't see him?
A. No sir.
267 Q. Did your wife describe him to you?
A. Yes sir.
Q. From that description, what kind of a looking man was he?
A. All she described was that he was light complected.
Q. Light complected?
A. Yes.
Q. Have any beard?
A. I could not say; the only thing I remember was that he was light complected.
Q. Find out whether an old man or young man?
A. From the description she gave, he must have been a middle aged man, probably 35 or 40.
Q. You and Mr. Anderson measured out the Emma line from the northwest corner to the southwest corner?
A. We measured the line—we measured the centre.
Q. That was up the hill from the cabin, was it not?
A. Which cabin?
Q. On the Emma, which would be east from the cabin?
A. The mine—centre line of the Independence No. 2——
Q. I was asking you if you and Anderson measured the line on the Emma No. 2?
A. We did.
Q. Where did you measure that, on the side line or centre line?
A. We measured that on the west side line.
268 Q. You found it about 1200 some odd feet in length?
A. Yes sir.
Q. What kind of a tape line did you use?
A. 75 foot tape.
Q. Was it a cloth tape or steel?
A. Cloth.
Q. What make was it?
A. I could not say.

Q. Was it originally a 75 foot tape, or was it a 100 foot tape with 25 feet cut off?
A. There was none cut off to my recollection.
Q. Was it one of those boys with little keys that you wind up that way?
A. Yes, and I still have that very same line.
Q. Have you got it with you?
A. I have not; it is at home.
Q. Was it an old or a new one then?
A. It has been used for some time.
Q. Any of it broken off?
A. I think not.
Q. None at all. Is that the same tape you measured the Independence with in 1889 when you located the Independence No. 2?
A. It is not.
Q. In measuring this Emma line, you made that pretty short?
A. Mr. Warren——
Q. No, in measuring the Emma line you made that short of 1500 feet; in other words, you got only about 1200 feet?
269 A. Yes, found it short.
Q. When you measured the line for Independence No. 2, instead of getting 1500 feet you got those lines about 2000 feet in length, did you not?
A. Yes, I remember we had to pull the corners in.
Q. The fact is, when you measured the Independence No. 2 you got a line about 500 feet too long?
A. On the north side line.
Q. On the north side line?
A. Yes.
Q. You got it about 300 feet too long on the south side line, didn't you?
A. Something like that.
Q. What time of day was it when you measured the Emma?
A. Some time in the middle of the day.
Q. Measure it all at once?
A. I could not say about that; probably we did.
Q. Now you say it was but twelve days after the location was made on January 1st, 1904, that you went out with Will Sullivan to show him certain lines you mentioned in your direct examination?
A. I said about eight or ten.
Q. Was anybody with you at that time?
A. Will Sullivan.
Q. Anyone besides you two?
A. No sir.
Q. A. J. Sullivan was not there?
270 A. No sir.
Q. You say you did not start out on the first day of January, 1904, with Mr. Will Sullivan and Mr. A. J. Sullivan?
A. I did not.
Q. You didn't go around the lines of any of the claims with either of them?

A. No sir.

Q. The conversation you testified to in your direct examination as having had out near the woodpile with A. J. Sullivan on the morning of January 1st, 1904, was there anybody present at that conversation besides you and A. J. Sullivan?

A. I think Mrs. Tucker was there and I think my wife was there; it seems like we were all there except Will Sullivan; I would not say; he may have been attending to his horses down at the mill, which I gave him the privilege to use as a stable on this particular time.

Q. You don't know whether Will Sullivan was present at that time or not?

A. I could not say.

Q. How did you come to go with Will Sullivan eight or ten days after the location of these claims to show him the line at that time?

A. Because I had promised him that I would do so. I was asked to do so, and I promised that a certain day I will be over there in the morning and go over on that Baltimore hillside and show him the west side line and also the north end line.

271 Q. You say that was because you had promised him?

A. Yes.

Q. When had you made that promise?

A. I made that promise shortly after he came up.

Q. Shortly after he came up to make the location, or shortly after he came up to do the work?

A. Shortly after he came up to do the work.

Q. Where was that promise made?

A. Right at my house.

Q. On January 1st, 1904, do you remember of seeing A. J. Sullivan and Will Sullivan come in from the Emma claims?

A. I do not.

Q. Did you go into the house about the time they did after they returned from there?

A. I did

Q. Did you go in from the same direction they did, or a different direction?

A. I came from the No. 4 tunnel.

Q. Did you see them before they arrived at the house?

A. No sir, but I saw them when they arrived at the blacksmith shop; I was working in the shop sharpening tools.

Q. When they came along, you quit sharpening tools and went to the house with them?

A. I did not.

Q. What did you do?

A. I completed my sharpening, what work I might have
272 in the shop, and put my fire out and went to the house and had dinner. They loafed around there until I was ready to go home to my dinner, and we all had dinner together.

Q. You all went in the house together?

A. Yes sir.

Q. About what time of day was that?

A. Perhaps it was about 1 o'clock.

Q. You were in the house when the location notices were drawn up, were you not?

A. I might have been on the premises, yes.

Q. You were in the house, were you not?

A. Well, probably part of the time.

Q. Do you remember whether you were in there all of the time?

A. I don't hardly think I was; of course he had four notices to draw up. Mr. Sullivan stated he was not very familiar—never done that kind of work before, and I remember he had a very slow job of it.

Q. He told you he was not familiar with that kind of work? You furnished him ink and pen?

A. I know he was furnished with pen and ink.

Q. Do you have any recollection of who was present at the time the notices were being written?

A. There was my wife and Mrs. Tucker, and I think both Sullivans were there.

Q. That is all that were around at all, was it not?

A. That is all.

Q. Did you remain in the house while these notices were
273 being drawn up, or did you go out?

A. I might have been in part of the time, but I had some things to do, working around to get one thing and another in the meat house outside of the house, and I performed those chores when this thing was done, before I went in.

Q. Were the notices drawn up before or after breakfast?

A. After breakfast.

Q. How long?

A. Right after breakfast.

Q. About what time did you breakfast that morning?

A. It could not have been very early, it being a holiday, and we were up late the evening before; I don't think it was very early; I know it was good daylight when the women folks got up to prepare breakfast.

Q. If I understand you correctly, on your examination you stated that you explained to somebody that the Emmas located north and south would be short claims, at least two of them?

A. Yes.

Q. Who was that explanation made to?

A. It was made to both Mr. Sullivan and Mrs. Tucker.

Q. Was that before breakfast or after breakfast?

A. I think probably that was before breakfast, I would not say.

Q. Before the notices were written at all
274 A. Yes sir.

Q. Did all three of them take part in the conversation?

A. You mean the two Sullivans?

Q. The two Sullivans and Mrs. Tucker.

A. I was particularly talking to the old gentleman himself about these matters as he was the party who was going to do—I understood he was going to locate these claims and not Mrs. Tucker.

Q. You understood they were to be located for Mrs. Tucker, did you not?
A. Sure, I did not; I had no right to know that.
Q. You were told that, were you not?
A. Yes.
Q. You met them before they got to the house on the evening of December 31st, didn't you, 1903?
A. I met them down on the grade.
Q. And then you asked Mrs. Tucker what brought her up there, did you not?
A. I might have said something to that effect; I don't remember really the words I used.
Q. You remember that there was something to that effect said?
A. Yes sir.
Q. She told you she came up to take care of that ground and relocate it, did she not?
A. She told me she brought Sullivan up with her to locate this old Emma group and ground.
Q. For her?
275 A. I suppose he had the privilege, that he could deed it to her after he located it.
Q. When she made known to you her purpose, you told her you would not allow any man to jump those claims, did you not?
A. I don't know about that.
Q. Do you have any recollection of that?
A. I may have said something to that effect; though I don't remember about what words I used.
Q. You have no recollection of being at the southwest corner of the Emma No. 2, which is the southwest corner of Malta No. 1, with Mr. A. J. Sullivan and Will Sullivan on the first day of January, 1904?
A. I do not.
Q. You have no recollection of it?
A. I have no recollection of it.
Q. If you were there, you have entirely forgotten it?
A. I would not forget it.
Q. You say positively and unequivocally that you were not there?
A. Yes sir.
Q. Or any other place on the Emma claims with them that day?
A. No sir.
Q. You say you drew a diagram of these claims for Mrs. Tucker?
A. I showed her what the result would be of locating them north and south.
Q. You testified on direct examination you drew a diagram, didn't you?
276 A. Yes, a kind of a diagram with a pencil showing how those claims were situated, how they laid, etc.
Q. When was that diagram drawn?
A. That is from this line.
Q. When was this diagram drawn?
A. Drawn in the morning.

Q. Before the location notices were written or afterwards?
A. Before the location notices were written.
Q. When you presented the diagram to Mrs. Tucker, what did she say about it?
A. She said she wanted to locate them the way they were located before.
Q. She wanted to locate them the same as they were located before?
A. Yes.
Q. When she said that, did you say that you had Independence No. 2 located over part of her ground?
A. That has been pointed out to her, by my claim being there, her claims would be short on one side.
Q. Did you explain to her that you had already located a portion of her ground?
A. I don't think—I don't know who told her in regard to that, but I stated very frankly to Jack Sullivan how this thing was and he told me he didn't come there to try to infringe on anything I had on the hill, that is to say to try to claim any of the ground or put any stakes on that ground.
Q. The fact is, at that time you wanted to conceal from
277 Mrs. Tucker that you had located over her claims?
A. I don't think so.
Q. This diagram that you drew at that time showed that the Emma No. 2 joined the Independence on the north, did it not?
A. You mean Emma No. 1?
Q. No, Emma No. 2.
A. Yes.
Q. If that was the case, your diagram was wrong, was it not?
A. By showing the two claims you mean, going south?
Q. By showing that the Emma No. 2 joined the Independence on the north?
A. Independence No. 2?
Q. I said the Independence.
A. It didn't show the Independence at all.
Q. The question is, what does your diagram show?
A. The diagram just showed the same of course as the Emma No. 1, and I think they call that; they also claimed in the later years they claimed four claims there together; that diagram showed the two going north from the line that we established as the base and then showed then claims going south, two claims.
Q. Your diagram showed that Emma No 2 joined the Independence?
A. Joined the Independence on the east, that would be Independence No. 2.
Q. Is that what your diagram shows?
A. Yes.
278 Q. Then you would have Emma No. 2 located about 1500 or 1600 feet east of where the plat shows it to be now, would you not?

A. No sir; I will just show you on the map.
Q. All right.
A. This is the line which we have established which is the Emma line.
Q. Pointing to west side line?
A. That is the line I gave Jack Sullivan.
Q. I am asking about the diagram; I am not asking about Billy Sullivan.
A. Here is this——
Q. Indicating line between corners 2 and 3 of Malta No. 1?
A. Here is the diagram then——
Q. Where did you have No. 2 located, with reference to the Independence, on this diagram?
A. This dotted line——
Q. You can answer that question without that dotted line.

(Question read.)

(COURT:) On the diagram you drew for them that morning, refresh your memory from the plat and then answer the question.
A. The diagram of these two claims?

(REEVES:)

Q. Answer the question, where did you have the Emma No. 2, with reference to the Independence?

(BOWEN:) We suggest, if they desire to get this matter out the proper way, the better way would be to let the witness draw a diagram.
(COURT:) He can answer the question after he gets the map drawn.
279 (Witness draws plat.)
(BRODHEAD:) Draw a diagram like the one you showed them on the morning of January 1st, 1904.

(REEVES:)

Q. Is that a good copy of the diagram that you drew for Mrs. Tucker on the morning of January 1st, 1904?
A. Yes sir.

(COURT:) Have it marked and introduced in evidence, if you want to.
(BOWEN:) We would like to have it marked, if they don't.
(Paper marked Defts' Ex. 8.)
(REEVES:) I will offer it in evidence.
(No objection.)
(COURT:) It may be admitted.

(REEVES:)

Q. This man you saw going up the gulch, did he have anything on his back, the one you saw going up to the Emma cabin the last of December, 1888?
A. He was packing something.

Q. What did it look like?
A. It looked like a flour sack on his back—white—looked some like it might be a flour sack.
Q. Do you know Sam Allen?
A. Yes sir.
Q. What kind of looking fellow is he?
A. He is light complected, tall, square shouldered.
Q. Did you know him in 1888?
A. Yes sir.
Q. Was it Sam Allen you saw up there?
A. No sir.

280 Redirect examination:

On the diagram A is Emma No. 1, C is Emma No. 2, B is Emma No. 3, D is Emma No. 4. As to the Malta group C is No. 1 and A is No. 2. The first time I ever saw any Malta stakes on any part of the Independence claims or on the south end line of the Malta after location, was in July, 1905. I never saw any stake on the Independence ground or on the south of the Malta prior to July, 1905.

ROBERT WARREN called on rebuttal testified as follows:
I was one of the original locators of the Independence No. 2 on the 3rd day of January, 1889. On the 3rd day of January, there was no evidence of any work having been done within a month or so anywhere upon the Emma claims. I have had considerable experience in mine operating and mine prospecting. I heard Sam Tucker's testimony as to work being done in December, 1888, and I know where that tunnel is. I observed the workings below the cabin on the Emma claim at that time.

Q. I will renew my question. If work had been done on a claim within a month and no other work had been done prior to that time for a year, could you determine the question from the dump, supposing that the debris and dirt had been deposited on the dump?

281 (BRODHEAD:) Object to that because there is no testimony here that Sam Tucker deposited any of the debris and dirt on the dump, and it is very often the case in doing work underground that the dirt is not always taken out and deposited on the dump, especially in the case of assessment work.
(COURT:) He may answer.

A. I could, that is, to my satisfaction; I might not demonstrate to some people's satisfaction, but I could determine that to my own.

(BOWEN:)

Q. I will ask you to state if during the fall of the year 1888 you had occasion to visit the Independence claims?
A. I did.
Q. I will ask you, in 1888 what, if any, survey did you make of the workings of the Independence?

(BRODHEAD:) Object- to as immaterial.
[Overruled.]

A. I made a careful survey of tunnel No. 2.

Q. When was it?

A. As near as I can recollect that was made somewhere about the 20th, possibly from the 15th to the 20th, might have been the 17th, 18th or 19th of December.

Q. Anything which occurred at that mine while you were there, or any conversation or anything of that kind which serves to fix that in your mind as to its being done?

A. Yes.

Q. What was it?

282 A. I was talking with my partners, Mr. Swanson and Mr. Anderson. Naturally being heavily interested in the matter at that time, I naturally wanted to look out and prosecute my interest to the best advantage I could, honorably of course.

Q. The question is, what the conversation was?

A. The conversation was about putting on an extension claim, Independence No. 2.

Q. What was the conversation that served to fix in your mind that it was within the time previous to the first of the year, or about the time previous to the first of the year when you were there?

A. I wanted to put on a new claim, the claim I wanted. This claim was Independence No. 2. I wanted to put a new additional claim on the end of the old Independence and I proposed that matter and talked about it with the boys right there, and ultimately as an ultimatum, Swanson suggested to me, why not wait.

Q. That is not what I was after at all. Was there any conversation there at that time which served to fix the time in your mind that this visit was within 10 or 15 days before the end of the year?

A. That is the very conclusion I was coming to. Mr. Swanson says "Robert, we better wait until after New Years previous to making this new location as they have not done their assessment work over on the Emma claims this year and possibly they may fail to comply with the law in that respect, and in fact it would be
283 rather a difficult matter for them to do so unless they put on several men." They had not got much time to do it, it was limited, that was about the essence——

(COURT:) The answers and the questions are entirely stricken out; I understand what your are after, but the answer is so incumbered by matters that they could not come into the case at all.

(BOWEN:) The only point about this testimony was that when this conversation occurred it was so close to the end of the year that they would not have time to do the assessment work before the end of the year. That is, on the Emma claims. That is the only purpose of it.

(COURT:) No, the question as to the witness- talking it over among themselves and deciding that the assessment work had not been done by the Emma claims brings it by indirection that which is the most vital point in the case. I do not wish to have that in the record.

[Exception by plaintiffs.]

When I was there in December there were no indications of any work being done at that time.

Cross-examination:

The discovery of the Independence No. 2 was done about three months prior to the location. It was about the 15th to the 20th that I was making this survey of the Independence mine. The survey was an inside survey. I made the survey and am a surveyor and an ore sampler and a geologist. I made the survey in tunnel No. 2. I used a good square, a compass and a tape line, and from that I could tell where I was under ground to my satisfaction.

284

Q. When you went to examine this tunnel or that is, the dump at the end of the tunnel, on the 2nd day of January, 1889, did you dig around in the snow?

A. I don't remember of going to any dump of the tunnel on January 2nd, 1889. I don't remember of saying that I was there or was digging around in the snow, or anything else.

Q. I am asking you if you did dig in the snow?

A. On the dump?

Q. Yes.

(BOWEN:) Objected to.

(REEVES:)

Q. May be I am mistaken as to the date. When did you go?

A. I was not there January 2nd.

Q. When were you there?

A. I was up January 3rd; what tunnel have you reference to?

Q. I believe you examined everything there was there on those Emmas.

A. I did not.

Q. What particular tunnel did you examine, then?

A. I didn't examine any of the tunnels.

Q. Did you examine any of the dumps?

A. That is as I understand the word "examine;" what is "examine?" Would you call it "examine" if I walked up here and glanced at this book and walked on, or would call it "examine" if I turned the book and examined it carefully? That is what I would call examined.

285

(COURT:) Be still. Put your question again, and make your answer to that question.

Q. In making your examination or observation, did you dig down in the snow to get to the dirt on the dump?

A. I did not.

Q. Didn't go into the cabin?

A. I did not.

I am a man of considerable experience in the mining business.

MARY SWANSON called on behalf of plaintiff in rebuttal testified as follows:

I am the wife of Charles Swanson, and in 1888 was living at the Independence mine in Independence gulch, and remember about Christmas day of a man coming to my house to borrow an ax to chop wood and he returned with the ax in less than two hours. He was a light complected man. I know Sam Allen, and it was not Sam Allen. I remember very well when Mrs. Tucker and Mr. Sullivan and his son came to my house on December 31st. My husband did not go out with the Sullivans and locate that day. He went about 10 o'clock and returned in two hours, and when they
286 first returned my husband was not with them, he was over at the blacksmith shop. When the two Sullivans came back they went over to the shop, and they all came back together for dinner.

Q. You could not tell any difference in the sound that your husband would make pounding, than if it had been somebody else?

A. There was not anybody else around.

Q. You could not tell it by the sound, could you?

A. And my husband told me.

Cross-examination:

This day I was attending to my household duties and did not go out to the mine and didn't go out to the blacksmith shop, but could see the smoke. I know it was nobody else there and I told Mr. Sullivan so.

Q. You could not tell any difference in the sound that your husband would make pounding, than if it had been somebody else?

A. There was not anybody else around.

Q. You could not tell it by the sound, could you?

A. And my husband told me.

CHARLES SWANSON called on rebuttal testified as follows:

Examining defendant's Exhibit 6, the map prepared by
287 Mr. Dukring, I will state that the cuts shown on the map as lying east of the discovery cut and along the lode line about 75 feet from the discovery cut are the cuts excavated in the year 1883 by Mr. Heller. I have been up there a good many years and have seen a good many different cuts. By the stirring of the ground and the digging around, the effect is to cause the scrubby brush to grow large. So far as the side of the hill is concerned, I am satisfied No. — discovery cut, that is, Independence No. 2, is higher than discovery cut of Independence No. 1. There is a slope and the wind causing the snow to drift in there where these discovery cuts are to the extent of 20 feet and covers both cuts. I heard Mr. Fred Smith testify and I heard him state that I had pointed out discovery cut No. 1 as the discovery cut of Independence No. 2. We were both on the ground, and I went up at one time to show him those discoveries and I paid strict attention to this old discovery on the old Independence. We were figuring, and he asked me for an option, and later he came on the ground and I invited him to follow me and I took

him on the hill to show him the discovery of the Independence, also the discovery of the Independence No. 2. I did not tell him that the large cut was the discovery of No. 2. It is impossible for me to tell him that when I know that is the discovery of the original Independence.

288 Q. When did you first do work on that place you call discovery cut of Independence No. 2?

A. That work was done some time in the latter part of the summen or early fall of 1888.

Q. While that was done, your stakes as set then, included that ground within the boundaries of the old Independence?

A. Yes.

Cross-examination:

On defendant's Exhibit 6, between figures 2 and 3, being the west end line of Independence No. 2, there is a point marked No. 1 discovery cut; that is the discovery of the Independence fixed by Popham Brothers who made the location; that is what I always recognize as the discovery of the Independence. The discovery of the Independence No. 2 is the one marked discovery on this map. I deny that there was a location notice of Independence No. 2 just above the big speckled boulder on the large cut.

Redirect examination:

I have not seen the location notice of No. 2 Independence since 1891 or 1892. If there was any location notice on the discovery cut of No. 1, I know nothing about it.

Whereupon plaintiff introduced in evidence without objection page 358, book 12, Quartz Claim Records of Alturas county, now Blaine, being the location notice of the original location
289 notice of the Independence mining claim, for the purpose of corroborating the testimony of Mr. Erik Anderson and Mr. Charles Swanson as to the distance from the discovery cut and the east end line of the Independence No. 1; also book 21, Quartz Claim Records of Alturas county, now Blaine, page 272 and 273, being location notice of the Mable Queen mining claim located June 9, 1888, by Peter Enberg and Samuel T. Tucker, and Mable Queen mining claim No. 2 located the same day by G. H. Knight, Peter Enberg and S. M. Tucker; also book 18, page 244, location notice made July 6, 1886, of the Julia Coile lode made by Thomas McArdell and S. M. Tucker. The purpose of this testimony being to show that S. M. Tucker and S. T. Tucker were owners of other mining claims besides Emma No. 1, 2, 3 and 4 in the year 1888.

Whereupon plaintiff rests.

A. J. SULLIVAN, called in sur-rebuttal, testified as follows:

Nothing was said to my recollection concerning a change in the Emma claims in any way. Nothing was said on the evening of December 31, 1903, or on January 1, 1904, by Swanson or anyone, that if a change was made in them four full claims could be pro-

cured. I did not hear Swanson tell Mrs. Kettler that he
290 could not go with my son and myself to make the location, in reply from a request from her so to do. Never heard any such conversation at all or anything to that effect. Swanson never pointed out any lines of the Independence No. 2 to me or to anyone on my presence at anytime, and I never heard of Independence No. 2 until I came into this court. He never made any reference to any corners of Independence No. 2. I remember that he referred to a cliff of rocks, but I understood that to lie on the Emma claims and that is all.

Q. I will ask you again if Swanson accompanied you and your son on January 1st, 1904?

A. He did.

(BOWEN:) Move that that be stricken out as a matter as already gone over on the direct.

Motion granted.

[Exception.]

When we returned from the southwest corner of Emma No. 2 Mrs. Swanson was at the house. She did not meet us until we got to the house. She said nothing about her husband being at the blacksmith shop. I don't know anything about the blacksmith shop. Mrs. Tucker was with her at the house. At no time while we were there did Swanson make any diagram of the Emmas or Independence claims to my knowledge, and he never did hand one to me. He made no marking of any kind whatever.

Will Sullivan and Mrs. Kettler called and testified to the same effect.

291 On behalf of plaintiff, the witness Charles Swanson filed his certificate of naturalization, being a certified copy of his declaration of intention to become a citizen of the United States, made before the Circuit Court of the United States for the District of Nebraska on March 31, 1873. This proof having been filed within the time allowed by the stipulation, to-wit, on Dec. 11, 1908.

## PLAINTIFF'S EXHIBITS.

### *Location Notice of Independence No. 2 Mining Claim.*

Notice is hereby given that we the undersigned, citizens of the United States of America, conforming to the mining laws thereto and the territory of Idaho, and the legal rules, regulations and customs of miners, have this 3rd day of January, 1889, located and do claim 1500 *hundred* feet linear feet on this lead lode bearing mineral in place by 600 *hundred* feet linear feet in width, the same being 300 *hundred* feet on each side of the centre thereof; together with all dips, spurs and angles and all other vein and lodes to top or apex of which lies within said boundaries.

This location is named Independence No. 2 lode or mine and is

situated and joining on the east end of the Independence mine and is on the divide between the Independence and Courier gulches in Warm Springs Mining District, Alturas County, Idaho Territory, and is bounded and described as follows:

292 Commencing at this notice and running thence 100 feet to the westerly direction of said lode, and 1400 feet on an easterly direction.

Located this 3rd day of January, 1889.

CHARLES SWANSON,
ERIK ANDERSON,
R. R. WARREN,
*Original Locators.*

TERRITORY OF IDAHO,
*County of Alturas, ss:*

I, Robert R. Warren, do solemnly swear that I am one of the within named locators and claimants, and am acquainted with the ground described in the within notice of location called Independence No. 2 mine or lode, and that the ground or claim therein described and any part thereof has not to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this territory, and if so located, that the same has been abandoned or forfeited by reason of failure of such former locator to comply in respect thereof with the requirements of said laws.

R. R. WARREN.

Subscribed and sworn to before me this 14th day of January, 1889.

JOHN CANNADY,
*County Recorder.*
By G. METZLER, *Deputy.*

I hereby certify that this notice of location was filed for record at the request of Robert R. Warren, January 4, 1889, at 3:40

293 o'clock P. M., and is duly recorded in book —, Quartz Claim Records of the said Alturas county, and in book "F" of Quartz Claims of the records of Warm Springs Mining District.

JOHN M. CANNADY,
*Recorder.*
By G. METZLER, *Deputy.*

*Location Notice Independence.*

Notice is hereby given that we the undersigned, citizens of the United States of America, conforming to the mining laws thereof, and of the territory of Idaho, and the local rules and regulations and customs of miners, have this 26th day of June, 1883, located and do claim fifteen hundred (1500) linear feet on this lead, lode or vein bearing mineral in place by six hundred (600) feet in

width, the same being three hundred (300) feet on each side of the centre thereof; together with all dips, spurs and angles, and all other veins or lodes the tops or apex of which lies within said boundaries.

This location is named Independence lode or mine, and is situated in Ida Harland gulch one-half mile south of the Baltimore mine in Warm Springs Mining District, Alturas county, Idaho Territory, and is bounded and described as follows:

Commencing at the discovery stake or monument and notice and running thence one hundred (100) feet easterly and 1400 feet westerly.

W. F. POPHAM,
J. A. POPHAM,
F. R. ADKINS.

294 TERRITORY OF IDAHO,
*County of Alturas, ss:*

I, F. R. Adkins, do solemnly swear that I am one of the within subscribed locators and claimants and am acquainted with the mining ground described in the within notice of location called the "Independence Mine or Lode," and that the ground or claim therein described or any part thereof, has not to the best of my knowledge and belief been heretofore located according to the laws of the United States and of this territory; and if so located, that the same has been abandoned or forfeited, by reason of the failure of such former locators to comply in respect thereto with the requirements of the said laws.

F. R. ADKINS.

Subscribed and sworn to before me this 7th day of July, A. D. 1883.

C. B. FOX,
*County Recorder.*
By JAS. JUDGE, *Deputy.*

Recorded at the request of F. R. Adkins, July 7, 1883.
C. B. FOX,
*County Recorder.*

PLAINTIFF'S EXHIBIT "A"

Consisted of the naturalization papers of Erik Anderson, witness, in due form.

295 PLAINTIFF'S EXHIBITS "C" AND "D"

Consisted of protest and adverse claim, filed by plaintiff in the United States land office at Hailey, Idaho, against the procedings for patent of the Malta No. 1 lode mining claim, same being filed within the time permitted by the laws of the United States and the

rules of the Department of the Interior, and said protest and adverse claim were in due form.

All exhibits, maps and diagrams introduced in the trial of said cause are hereby made a part of this Bill of Exceptions, and the originals are hereby referred to and included within this Bill of Exceptions, it being stipulated by the parties that such exhibits, maps and diagrams may be forwarded to the Supreme Court and there used as a part of this Bill of Exceptions and statement of the case in the Supreme Court.

DEFENDANT'S EXHIBITS.

*Location Notice of Emma No. 2.*

Notice is hereby given that we the undersigned, having complied with the requirements of chapter six, title thirty-two, of the Revised Statutes of the United States and of the laws of Idaho Territory relating to the location of mining caims, and the local customs, laws and regulations, have located fifteen hundred (1500) linear
296 feet on this vein or lode of quartz, by three hundred (300) feet in width on each side of the middle of the lode or vein, making six hundred (600) feet in width.

The calim so located is hereby named the Emma No. 2 and is situated in Warm Springs Creek Mining District, Alturas County, Idaho Territory, and is described as follows:

Commencing at this stake and notice, which is situated about one mile north of the North Star mine and on the east fork of Wood river, and running thence along the vein or lode in a southerly direction said distance of fifteen hundred (1500) feet to the other center end stake of this claim.

Located May 21, 1881.

JOHN SEARS,
S. M. TUCKER,
*Locators.*

TERRITORY OF IDAHO,
*County of Alturas, ss:*

I, John Sears, do solemnly swear that I am acquainted with the mining ground described in the notice of location herein called the Emma No. 2 ledge, lode or claim, and that the ground and claim therein described or any part thereof has not to the best of my knowedge and belief been heretofore located acoording to the laws of the United States and of this territory; or if so located, that the same had been abandoned or forfeited by reason of the fail-
297 ure of such former locators to comply in respect thereto with the requirements of said laws.

——— ———.

Subscribed and sworn to before me this 26th day of May, 1881.

WARREN P. CALLAHAN,
*County Recorder.*
By JAMES FERMING, *Deputy.*

Recorded at request of John Sears, May 26, 1881.
WARREN P. CALLAHAN,
*County Recorder,*
By JAMES FERMING, *Deputy.*

*Location Notice Malta No.* 1.

Notice is hereby given that the undersigned, A. J. Sullivan, Blaine County, Idaho, citizen of the United States of America (or has declared his intention to become such) of the age of twenty-one years, having on the first day of January, 1904, discovered a vein of quartz, or rock in place containing gold, silver or other precious metals within the limits of the claim hereinafter described, under and in accordance with the Revised Statutes (chapter six, title thirty-two) and the laws of the State of Idaho, does hereby this 1st day of January, 1904, locate the Malta No. 1 mining claim, situated in Warm Springs Mining District, Blaine County, state of Idaho, that said claim extends 50 linear feet in a northerly direction along said vein or lode from point of discovery, and 1450 linear feet in a southerly direction therefrom; that said point of discovery is
298 shown by a certain stake at which point the work of discovery was done; said claim is situated at the head of Independence gulch and joins the Independence mine on the north, and about 2000 feet from the present workings of Independence, and about the same distance in an easterly direction from the Independence mill, and joins Malta No. 2 on the south running parallel with Malta No. — on west side; that said claims extends 300 linear feet on each side of the middle of said vein or lode, and that I intend to hold and work said claim in accordance with the laws of the United States and of the state of Idaho.

Name of locator: A. J. SULLIVAN.

Discovered Dec. —, 1903.
Located Jan. —, 1904.

STATE OF IDAHO,
*County of Blaine, ss:*

I, W. A. Sullivan, agent for A. J. Sullivan, do solemnly swear that I am a citizen of the United States (or have declared my intention to become such) and that I am acquainted with the mining ground described in this notice of location, and herewith called the Malta No. 1 ledge, lode or claim; that the ground or claim therein described, or any part thereof, has not to the best of my knowledge and belief been heretofore located according to the laws of the United States and of the state of Idaho; or if so located, that the same has been abandoned or forfeited by reason of the fail-
299 ure of such former locator to comply in respect thereto with the requirements of said laws; and that I have opened new grounds to the extent or depth of ten feet, as required by the laws of the state of Idaho.

W. A. SULLIVAN,
*Agent for A. J. Sullivan.*

Subscribed and sworn to before me this 4th day of February, 1904.

GEO. A. McLEOD,
*County Recorder.*

That thereupon said trial closed and the Court took the matters therein involved under advisement, and on the 15th day of February, 1909, filed his Findings of Fact, Conclusions of Law and Decision in said cause, and on the same day signed and filed Decree and Judgment therein, all of which appears in the Judgment Roll in said action.

*Notice of Intention to Move for New Trial.*

To the defendants above named, and to Messrs. Sullivan & Sullivan, McFadden & Brodhead and F. Reeves, Esq., attorneys for defendants, and to the Clerk of the said Court:

You and each of you will please take notice that the plaintiff, Charles Swanson, intends to move the Court to vacate and set aside the decision of the Court rendered in the above cause, and to
300 grant a new trial of said cause, upon the following grounds, to-wit:

1.

Newly discovered evidence, material to plaintiff, which he could not with reasonable diligence have discovered and produced at the trial.

2.

Insufficiency of the evidence to justify the decision, and that such decision is against law.

3.

Errors in law occuring at the trial, and excepted by the plaintiff.

Said motion will be made upon affidavits hereafter to be filed and served upon you, and upon the records and files of said action, and upon a statement of the case hereafter to be prepared, served, settled and filed.

Dated February 17, 1909.

STOCKSLAGER & BOWEN,
*Attorneys for Plaintiff, Hailey, Idaho.*

Served February 18, 1909.

SULLIVAN & SULLIVAN,
*Attorneys for Defendants.*

Filed February 18, 1909.

301 *Stipulation.*

Prior to the time provided by law wherein a statement of the case or bill of exceptions should be served and filed, it was agreed and stipulated, which appears by the records of the Court, that the time wherein the plaintiffs might prepare, serve and lodge a Bill of Exceptions or Statement of the Case or Affidavits to be used on motion of a new trial or on appeal or either or both should be extended up to and including the first day of May, 1909.

*Specifications Wherein the Evidence and Pleadings are Insufficient to Sustain the Findings and Decision of the Court.*

No. 1. (Finding No. 3.)

The plaintiff objects and excepts to Finding of Fact No. 3, and particularly that portion thereof which states that on or about the 21st day of May, 1881, John Sears and S. M. Tucker found within the limits of the alleged Emma No. 2 "rock in place bearing silver and other precious metals," for the reason that the evidence does not justify such finding, but on the contrary shows that all ores or metals found therein were not in place and that a legal discovery was not made.

302 No. 2. (Finding No. 3.)

The plaintiff objects and excepts to Finding No. 3, and particularly that portion thereof which states that said locators located along the vein therein 1500 feet, for the reason that the testimony shows that such location did not exceed 1200 feet in length, this being the testimony of those familiar with the location, corroborated by the locator, John Sears.

No. 3. (Finding No. 3.)

Plaintiff objects and excepts to that portion of Finding No. 3 which states that the locators of Emma No. 2 duly located and appropriated the ground within said claim, as being a mere conclusion of law, unsupported by the evidence.

No. 4. (Finding No. 3.)

Plaintiff objects and excepts to Finding No. 3, and all thereof for the reason that same is immaterial to any issue presented by the pleading, and is unsupported by the evidence; that the testimony shows that said Emma No. 2 location, and all claims and rights thereunder, was December 31, 1903, abandoned and forfeited by the owners thereof, by failure to perform the annual labor required by the laws of the United States.

No. 5. (Finding No. 4.)

Plaintiff objects and excepts to Finding No. 4, and particularly that portion thereof wherein it says that a "re-location" of
303 the Emma No. 2 was made on behalf of Nancy M. Kettler, for the reason that there is no proof of same, but on the contrary, the testimony shows on her behalf that a new and original location was made and said Emma No. 2 forfeited and abandoned.

No. 6. (Finding No. 4.)

Plaintiff objects and excepts to Finding No. 4, and all thereof, for the reason that the evidence does not sustain said Finding in that all the evidence shows that Nancy M. Kettler was not the sole owner of the Emma No. 2 location but that she was part owner only, and in the year 1903 knowingly failed to perform her assessment work on said claim, and on January 1, 1904, by one A. J. Sullivan, made a location of a new claim.

No. 7. (Finding No. 5.)

Plaintiff objects and excepts to Finding No. 5, and all thereof, for the reason that the evidence fails to show that such labor was performed on Emma No. 1 or that it was for the benefit of said Emma No. 2, and for the reason that evidence on defendant's behalf shows that in the year 1888, the said Emma location was a part of a group of four claims owned in common, and that all the annual labor performed that year was performed for the use and benefit of all of said group, and that the total value of the labor and improvements did not exceed $175.00.

304 No. 8. (Finding No. 6.)

Plaintiff objects and excepts to Finding No. 6, and particularly that portion thereof which states that the work and labor of Tucker and Smith was for the development of said claim, Emma No. 2, for the reason that the evidence on behalf of defendants shows that said work and labor was for the use and benefit of a group of four claims and did not exceed in value $175.00, and that the nature of the works was for benefit of the other and more valuable claims of said group.

No. 9. (Finding No. 6.)

Plaintiff objects and excepts to Finding No. 6, and all thereof for the reason that the testimony on behalf of the defendants tending to show the performance of any labor during 1888 on the group of claims on which the Emma No. 2 was a part, was improbable and unworthy of credit or belief; and because the testimony, outside the testimony of Samuel Tucker, an interested witness, shows that no work or labor was performed on the Emma No. 2 claim or for the same during the year 1888.

No. 10. (Finding No. 9.)

The plaintiff objects and excepts to that portion of Finding No. 9 which states in substance that the land embraced within the Independence No. 2 location included a strip of land 600 feet
305 by 600 feet of the Emma No. 2 mining claim, and also that portion which states that said Emma No. 2 mining claim was a valid subsisting mining claim at that time, for the reason that the testimony both on the part of the plaintiff and the defendant shows that the Emma No. 2 did not exceed over 400 feet in length within the boundaries of the Independence No. 2; and for the reason that said Emma No. 2 had been forfeited and abandoned by their locators during the year 1888.

No. 11. (Finding No. 9.)

Plaintiff objects and excepts to that portion of Finding No. 9 which in substance states that the discovery of the Independence No. 2 claim was on ground embraced and included within the Emma No. 2 claim, whereas in fact the testimony of Joseph Heller, witness on the part of defendants, and other testimony on behalf of the defendants, showed that he dug two cuts near the west line of the Emma No. 2 claim in 1883, and that the discovery of the Independence No. 2 was 75 feet west of such cuts and on ground embraced within the Independence No. 1 but afterwards within the ground of the Independence No. 2 location; and for the reason that all of the testimony in the case showing where such cuts were excavated and discovery made shows such discovery to have been made on Independence No. 2 ground. The Malta lines being west of the Emma No. 2 lines, and in no wise the same.

306 No. 12. (Finding No. 9.)

Plaintiff objects and excepts to that portion of Finding No. 9 relating to the withdrawing of the east end line of the Independence No. 1 for the reason that the same is ambiguous, unintelligible, uncertain and apparently having no bearing on the issues and being contradictory to the rest of the finding; the testimony showing without contradiction that in the year 1883 the stakes on the east end of the Independence No. 1 claim were a short distance over and beyond the west side line of the Emma No. 2 claim, and that at the request of the owners of the Emma No. 2, the owners of the Independence No. 1 withdrew their stakes on their east end line, placing them on the west side line of the Emma No. 2; and the testimony further shows without contradiction that in the year 1889 on January 3rd at the time of the location of the Independence No. 2, the owners of the Independence No. 1 who were the locators of the Independence No. 2, finding that their location notice called for a distance of 100 feet east from their discovery cut, when according to actual measurements, the distance from such discovery cut to their east end line and boundary of the Emma No. 2 was

275 feet, withdrew such east line in placing their stake so as to correspond with the location notice, to-wit, about 100 feet east of such discovery cut, and that the distance and ground lying east of their said east end line and the west side line of the Emma
307 No. 2 was about 175 feet, and that this portion comprised a part of the new location known as the Independence No. 2; that the testimony further shows that the survey stakes of the Independence No. 2 are in fact 64 feet or thereabouts east of the discovery cut of the Independence No. 1, leaving about 211 feet between the east end line of the Independence No. 1 which is the west end line of the Independence No. 2 to the west side line of what was prior to its forfeiture and abandonment the Emma No. 2.

No. 13. (Finding No. 10.)

Plaintiff objects and excepts to that portion of Finding No. 10 which states that the plaintiff did not have open possession of the premises in dispute for the reason that the testimony uncontradicted shows that the said plaintiff was in open and peaceable possession of all parts of the Independence No. 2 subsequent to its location, and that the portion of said premises in dispute lying west of the west side line of the former Emma No. 2 claim had been in a peaceable possession of plaintiff and his predecessors since the year 1883.

No. 14. (Finding No. 10.)

Plaintiff objects and excepts to that portion of Finding No. 10 which states that the defendants and the owners of the Emma No. 2 did not have any notice of the claims of this plaintiff for the reason that it is immaterial and not in issue by the pleadings, and
308 for the further reason that the testimony offered on behalf of defendants shows that another person owned a part interest in the Emma No. 2 at all time and there is no testimony to show what notice or knowledge he may have had.

No. 15. (Finding No. 10.)

Plaintiff objects and excepts to that portion of Finding No. 10 which states in effect that the defendant expended large sums of money in the Emma No. 2 after January 3, 1889, for the reason that the same is immaterial, not in issue by the pleadings, and for the further reason that the testimony on behalf of the defendants shows that the only work performed or improvements made was for annual labor as required by law, and that the most of this was done by third parties under a lease and bond and *that* no expense to the defendant.

No. 16. (Finding No. 15.)

The plaintiff objects and excepts to all of Finding No. 15 for the reason that the same is immaterial to any issue made by the pleading; and for the further reason that the testimony fails to show

that the defendant was called to Seattle as stated; and for the further reason that the testimony fails to show that the defendant, Nancy M. Kettler, did not intend to abandon the Emma No. 2 mining claim for the reason that her acts clearly show an intention to
309 abandon and to shut out the interest of her co-owner in the said Emma No. 2 location.

No. 17. (Finding No. 16.)

Plaintiff objects and excepts to all the Finding No. 16 for the reason that the same is immaterial.

No. 18. (Finding No. 17.)

Plaintiff objects and excepts to Finding No. 17, and all thereof, for the reason that the same is a mere statement as to certain evidence and not an ultimate fact at issue in the case.

No. 19. (Finding No. 18.)

Plaintiff objects and excepts to Finding No. 18 for the reason that the same is immaterial and a mere statement of evidence and not a finding upon ultimate fact.

No. 20. (Finding No. 19.)

Plaintiff objects and excepts to Finding No. 19, and all thereof, for the reason that the same is immaterial and a mere statement of evidence and not finding upon an ultimate fact.

No. 21. (Finding No. 20.)

Plaintiff objects and excepts to Finding No. 20, and all thereof, for the reason the same is immaterial and a mere statement of evidence and not a finding upon an ultimate fact.

310 No. 22. (Finding No. 21.)

Plaintiff objects and excepts to Finding No. 21, and all thereof, for the reason same is immaterial and a mere statement of the evidence and not a pleading upon an ultimate fact.

No. 23. (Finding No. 22.)

Plaintiff objects and excepts to Finding No. 22, and all thereof, for the reason same is immaterial and a mere statement of the evidence and not a pleading upon an ultimate fact.

No. 24. (Finding No. 23.)

Plaintiff objects and excepts to all of Finding No. 23 and particularly that portion thereof which states that plaintiff went with said Sullivans to the southeast and southwest corners of Emma No.

2 and pointed out to them stakes as the Emma No. 2, whereas, the testimony shows on the part of defendant, corroborated by the testimony of A. J. Sullivan and the facts and circumstances in the case, that plaintiff did not visit the southeast or southwest corners and that no stakes were ever placed on the said Malta No. 1 claim until placed in 1905 by the defendant, John T. Sears.

No. 25. (Finding No. 24.)

Plaintiff objects and excepts to all of Finding No. 24 for the reason there is no testimony justifying the said finding.

311 No. 26. (Finding No. 27.)

The plaintiff objects and excepts, and all thereof, to Finding No. 27 for the reason that the testimony shows by defendant herself that nothing plaintiff did deceived her with reference to her line, and there is no testimony in the case to show that defendant would not have attempted to have made a location had she known of the Independence No. 2; and for the reason that there is no testimony in the case to show, that had not defendant known of the Independence No. 2, she would not have spent the same money as she did; but on the contrary, the testimony of defendant shows that so far as she was concerned, and her predecessors in interest the portion of the Emma No. 2 claim embraced within the Independence No. 2 was over a thousand feet south of where she had done any work or expended any money; and the testimony further shows that the Emma No. 2 was the least valuable of its group and that all the work and money expended was for assessment work for the group of claims.

No. 27. (Finding No. 28.)

Plaintiff objects and excepts to Finding No. 28, and all thereof, for the reason that there is no testimony showing any duty or obligation on the part of plaintiff; and for the further reason that the testimony uncontradicted shows that he did disclose to the said defendants the fact that the Malta location would not go any
312 farther south than the Independence group of claims and the testimony on behalf of defendant show- that at her suggestion, the Independence claim was made the south boundary line of the Malta No. 2 and the location notice drawn accordingly, fixing the Independence location of plaintiff as the south line of the Emma No. 2, and there is no evidence to justify the finding as plaintiff desired to deceive defendant, but on the contrary the testimony shows on behalf of the defendant that Mrs. Kettler, the defendant, knew the location of the Emma lines and where she desired the Malta lines, as well as the plaintiff, and that the stakes were located accordingly.

No. 28. (Finding No. 29.)

Plaintiff objects and excepts to that portion of Finding No. 29 which states in substance that *that* the defendant, by A. J. Sullivan,

made a location of the Malta No. 1 claim and particularly of the ground in dispute for the reason that the testimony shows that this claim was forfeited in 1888 and located in 1889 as the Independence No. 2, and such location was valid and subsisting on January 1, 1904; and for the further reason that the testimony offered on behalf of defendants shows that the Emma No. 2 claim was forfeited and abandoned in 1903 and that at that time the Independence No. 2, a valid and subsisting claim, included a portion of the Malta No. 1 which portion is the portion in dispute, and that such
313 forfeiture in 1903 would inure to the benefit of the Independence No. 2, a prior location.

No. 29. (Finding No. 29.)

Plaintiff objects and excepts to that portion of Finding No. 29 which states that the ground embraced in Emma No. 2 and Malta No. 1 are identical and embraces the ground in dispute for the reason that the testimony shows, both on part of the plaintiff and defendant, that the Malta claim is a great distance west and south of the former Emma No. 2.

No. 29. (Finding No. 30.)

Plaintiff objects and excepts to Finding No. 30, and all thereof, for the reason that the testimony shows that at said time said land was embraced within the Independence No. 2 location.

No. 30. (Finding No. 31.)

Plaintiff objects and excepts to Finding No. 31 and particularly that portion which states that the defendant found and made a discovery of vein or lode of rock in place bearing silver and other precious metals, and located said claim 1500 feet in length placing boundaries therefor, the testimony showing no discovery of rock in place, as contemplated by law, and that no posts were ever erected at the south boundary line of the said claim until 1905 when erected by John T. Sears, and owner at that time, and not 1500 feet in length.

314 No. 31. (Finding No. 32.)

Plaintiff objects and excepts to Finding No. 32, and all thereof, for the reason that there is no testimony to justify the finding and there is no testimony to show that a mistake was made in the location of said claim; but that the testimony shows that said location notice intended to tie the Malta No. 1 to the Independence on the south; and for the further reason that such finding is not justified by the pleadings in said cause.

No. 32. (Finding No. 33.)

Plaintiff objects and excepts to Finding No. 33, and all thereof, for the reason that all the testimony on part of plaintiff and de-

fendant, and particularly the cuts and monuments on the ground, show beyond any reasonable doubt that the lines of Malta No. 1 are not identical with the Emma No. 2 but are further north and south; and the testimony further shows that the south boundary stakes of the Malta No. 1, as established by John T. Sears in 1905, were north and east of the survey stakes of the Malta No. 1 and that the said south boundary stakes of the Malta No. 1 were moved and extended south and west by the defendant, Nancy M. Kettler, in 1907.

No. 33.

Plaintiff objects and excepts to the Conclusion of Law No. 1 for the reason that same is not justified by the pleadings and
315 evidence in this case. The pleadings and evidence showing that the plaintiff is entitled and is the owner and entitled to the possession of the area specified in the complaint as being in dispute.

No. 34.

For the same reason plaintiff objects and excepts to Conclusion of Law No. 2.

No. 35.

For the same reason plaintiff objects and excepts to Conclusion- of Law No. 4 and 3.

*Errors of Law Relied On.*

The plaintiff hereby specifies the following rulings of the Court made during the progress of the trial as errors of law upon which plaintiff relies, all of which were duly excepted to by the plaintiff and to which plaintiff still excepts:

No. 1.

The Court erred in overruling plaintiff's objection to the following questions asked the witness, Robert R. Warren, on cross-examination: "Don't you know as a matter of fact that the ground that you said in the affidavit was vacant, was located as the Emma No. 2 mining claim?"

No. 2.

316 The Court erred in overruling plaintiff's objection to question asked the witness, Warren, on cross-examination, "Upon what assumption did you decide it was forfeited?"

No. 3.

The Court erred in overruling the plaintiff's objection to question asked the same witness on cross-examination, "How do you know that?"

No. 4.

The Court erred in overruling plaintiff's objection to the question asked the same witness on cross-examination, "Were there any other parties other than those you have mentioned who have been watching that matter?"

No. 5.

The Court erred in overruling plaintiff's objection to question asked on cross-examination of the same witness, "You knew where there was a cabin located over on Emma No. 2, didn't you, at that time?"

No. 6.

The Court erred in overruling plaintiff's objection, same witness on cross-examination, "You know that was on the claim running in a southerly direction up where the Independence was going across?"

317 No. 7.

The Court erred in overruling plaintiff's objection to the evidence of defendant relating to the doing of assessment work subsequent to the year 1889 on the Emma No. 2.

No. 8.

The Court erred in overruling the plaintiff's objection to the following question asked the witness, Joseph Heller: "Did you do enough work to cover the assessment work on the Emma No. 2?" The question relating to the year 1890 and 1891.

No. 9.

The Court erred in overruling plaintiff's objection to the question asked the same witness, "Did he know you were working over on the Emma?"

No. 10.

The Court erred in overruling plaintiff's objection to question asked the same witness, "Did Mr. Swanson show you or notify you of any posts on the Independence No. 2?"

No. 11.

The Court erred in overruling the plaintiff's objection to question asked the same witness, "Did he make any claim whatever to the lower half of No. 2?"

318 No. 12.

The Court erred in overruling plaintiff's objection to question asked the same witness, "State what conversation, if any, you had with Mr. Swanson during 1890 as to the Emma No. 2, if any?"

No. 13.

The Court erred in overruling plaintiff's motion to strike out all of the testimony relating to the doing of assessment work and other upon the alleged Emma No. 2 location during the year 1890 and 1891 to 1904, or at any time prior to 1888, for the reason that it is immaterial, irrelevant and incompetent.

No. 14.

The Court erred in overruling plaintiff's objection to question asked the witness Heller, "Where did you see that?"

No. 15.

The Court erred in overruling plaintiff's objection to question asked the witness John T. Sears, "When you came back there in 1905 about how much work had been done on Malta No. 1 and 2, or the old Emma No. 1 and 2?"

No. 16.

The Court erred in overruling plaintiff's objection to the
319 question asked the witness, Samuel Tucker, "How much work did you do in 1892, at least?"

No. 17.

The Court erred in overruling plaintiff's objection to the question asked the witness, Tucker, "Did Swanson at that time make any claim to any portion of Emma No. 2?"

No. 18.

The Court erred in overruling plaintiff's objection to a question asked the witness, Tucker, "I will ask you that if during any of those times he made any claim to any portion of the Emma No. 2?"

No. 19.

The Court erred in overruling plaintiff's objection to question asked the same witness, "Did he at that time make any statement or tell you that there was a location of the Independence No. 2?"

No. 20.

The Court erred in overruling plaintiff's objection to the admission of the certified copy of the notice of location of the Malta No. 1 claim.

No. 21.

The Court erred in overruling plaintiff's objection to the
320 question asked the witness, Nancy M. Kettler, "Now I will ask you whether yourself or Mr. Tucker had worked upon

this Emma No. 1 and Emma No. 2 especially each year up to 1903?"

No. 22.

The Court erred in overruling plaintiff's objection to the question asked the same witness, "State from what you saw, how many feet in your judgment was performed on the Emma No. 2?"

No. 23.

The Court erred in overruling plaintiff's motion to strike out the answer of the last question.

No. 24.

The Court erred in overruling plaintiff's objection to the question asked George Havery, "Did Swanson at any time make any claim to any portion of the Emma No. 2?"

No. 25.

The Court erred in overruling plaintiff's motion to strike out the testimony of the witness Havery, relating to the location of the southwest corner of the Emma No. 2.

No. 26.

321 The Court erred in overruling plaintiff's objection to the introduction of the recorded affidavit of assessment work for the year 1895 on the Emma No. 2.

No. 27.

The Court erred in sustaining motion to strike out the testimony of the witness Nancy M. Kettler relating to the Julia lode and the Mabel Queen lode.

No. 28.

The Court erred in overruling plaintiff's objection to the question asked the witness, Harry J. Allen, "When were your second papers issued?"

No. 29.

The Court erred in overruling plaintiff's motion to strike out all the testimony offered in behalf of defendant relating to the location of the Malta No. 1 claim for the reason that it does not appear that the location was not made upon ground that was vacant and unappropriated, and for the reason that it related to the location which in point of time was subsequent to the Independence No. 2.

No. 30.

The Court erred in overruling plaintiff's motion to strike out all of the testimony on behalf of the defendant relating to conversations and acts of the plaintiff, Charles Swanson, on the 1st day
322 of January, 1904; and particularly all of testimony of A. J. Sullivan, William Sullivan and Nancy M. Kettler.

No. 31.

The Court erred in sustaining defendant's objection to question asked plaintiff, "I will ask you to state whether or not you had any reasons for making such measurements?"

No. 32.

The Court erred in refusing to permit plaintiff to prove by his offer the reason why that he made the measurements indicated in the previous question.

No. 33.

The Court erred in its conclusion of law No. 1 and in deciding that the defendant, Nancy M. Kettler, is entitled to the premises in dispute for the reason that said conclusion is unwarranted by the evidence and not justified by the Findings of Fact.

No. 34.

The Court erred in its 2nd conclusion of law for the same reason.

No. 35.

The Court erred in its 3rd conclusion of law for the same reason.

323 No. 36.

The Court erred in its 4th conclusion of law for the same reason.

No. 37.

The Court erred in its 6th conclusion of law for the same reason.

Each and all of the errors of law hereinbefore specified, the plaintiff hereby objects and excepts to.

No. 38.

The Court erred in rendering and entering judgment in favor of the defendant and as against the plaintiff.

The plaintiff, Charles Swanson, hereby tenders and proposes the foregoing as their statement of the case on motion for a new trial, and Bill of Exceptions on such motion to be used on such motion and appeal of said action, the foregoing statement containing all of the evidence offered or introduced, the objection made and the ex-

ceptions taken and the proceedings had at the trial of said cause; and is full, true and correct, and plaintiff asks to agree to the same that the same may be settled, allowed, certified, engrossed and filed as a Bill of Exceptions and Statement of the Case to be used
324 on motion for new trial and appeal.

Dated May 1st, 1909.

STOCKSLAGER & BOWEN,
*Attorneys for Plaintiff.*

*Stipulation.*

It is hereby stipulated and agreed that the foregoing is a full, true and correct statement of all the evidence offered, introduced or considered, the objections made and the exceptions taken and all the proceedings in said cause and that the same may be settled, allowed, engrossed and certified as such and to be used as a Statement of the Case on motion for a new trial and on appeal to the Supreme Court of the State of Idaho.

Dated May 20th, 1909.

STOCKSLAGER & BOWEN,
*Attorneys for Plaintiff.*
FRANK REEVES AND
SULLIVAN & SULLIVAN,
*Attorneys for Defendants.*

*Certificate of Judge.*

STATE OF IDAHO,
*County of Blaine, ss:*

I, Edward A. Walters, District Judge of the Fourth Ju-
325 dicial District of Idaho, sitting in and for Blaine County, State of Idaho, and the presiding Judge before whom the above entitled action was tried and decision rendered, hereby certify that the foregoing is a statement of all the evidence offered, introduced or considered at the trial of said action, all the objections made and the exceptions taken, and all the proceedings had therein including the proceedings for a new trial taken thereafter, and is hereby settled and allowed as settled and is and does constitute a full, true and correct Statement of the Case to be used on motion for a new trial and appeal of said cause to the Supreme Court of the State of Idaho.

Dated May 20th, 1909.

EDWARD A. WALTERS,
*District Judge.*

Service of the foregoing is hereby acknowledged this 1st day of May, 1909.

SULLIVAN & SULLIVAN,
*Attorneys for Defendants.*

Statement of the Case filed May 20, 1909.

*Order Overruling Motion for New Trial.*

The application and motion of the plaintiff in the above
326 entitled action to set aside and vacate the decision of the Court in said cause and grant a new trial of the same came on regularly for hearing before the Judge of said Court at Chambers, on the 21st day of May, 1909, Messrs. Stockslager & Bowen appearing as counsel for plaintiff and Messrs. Sullivan & Sullivan and Frank Reeves, Esq., appearing as counsel for defendant; and the Court having duly considered said Motion and the Statement of the Case heretofore settled and filed, together with the specifications of error therein contained, both as to errors in law and insufficiency of the evidence, and the Court being fully advised:

It is hereby ordered that the said motion is hereby denied and overruled, to which ruling counsel for plaintiff excepts and such exception is allowed by the Court.

Dated May 21st, 1909.

EDWARD A. WALTERS,
*District Judge.*

Filed May 26, 1909.

*Notice of Appeal.*

To the defendants above named and to Brodhead & McFadden, Sullivan & Sullivan, and Frank Reeves, their attorneys, and to the Clerk of the said Court:

You and each of you will please take notice that the
327 plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Idaho from the judgment therein entered in the said District Court on the 15th day of February, 1909, in favor of the defendants and against the plaintiff and from the whole thereof; and also from an order denying said plaintiff's motion for a new trial dated May 21, 1909, and filed in said cause May 26, 1909, and from the whole thereof.

Dated this 19th day of July, 1909.

STOCKSLAGER & BOWEN,
*Attorneys for Plaintiff.*

Copy of the foregoing received this 19th day of July, 1909.

BRODHEAD & McFADDEN,
SULLIVAN & SULLIVAN AND
FRANK REEVES,
*Attorneys for Defendants.*

*Certificate of Attorneys.*

We, the undersigned, attorneys for the respective parties in the above entitled action, do hereby Certify that the above and foregoing constitute full, true and correct copies of the Judgment Roll

in said action, the records and files therein, the Statement of the Case duly engrossed, settled and filed and used on motion for
328 a new trial, the Order Overruling Motion for a New Trial, and the Notice of Appeal, all of which constitute a full, true and correct Transcript on Appeal, as provided by law, to be used on appeal from the judgment and order overruling motion for a new trial.

And we further certify that a good and sufficient undertaking on appeal, in due form, has been properly filed and that same was filed July 20, 1909.

Dated Sept. 14, 1909.

SULLIVAN & SULLIVAN,
FRANK REEVES,
*Attorneys for Respondents.*
STOCKSLAGER & BOWEN,
*Attorneys for Appellant.*

Copy received Sept. 14, 1909.

SULLIVAN & SULLIVAN.

329 *Record Entries.*

The following entries appear of record under the dates named:

No. 1596.

CHARLES SWANSON, Appellant,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Respondents.

BOISE, IDAHO, *November* 17, 1909.

This cause having been heretofore set for hearing, now on this day the same was called, A. M. Bowen and John M. Zane appearing for appellant, and W. E. Sullivan and Frank Reeves appearing for respondents. After argument the cause was submitted and by the court ordered taken under advisement.

Chief Justice Sullivan did not sit in this case.

BOISE, IDAHO, *November* 30, 1909.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Stewart to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the Fourth Judicial District in and for the county of Blaine in the above entitled cause be and the same hereby is affirmed. Costs are awarded in favor of re-respondent-.

330 BOISE, IDAHO, *January* 4, 1910.

Petitions for rehearing having been filed on behalf of both appellant and respondents in the above entitled case, and the court having fully considered the same, now on this day the cause was again called, and the opinion of the court is delivered by Justice Ailshie, to the effect that said petitions for rehearing be and the same hereby are denied.

331 Filed Nov. 30, 1909. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho, November Term, 1909.

CHARLES SWANSON, Appellant,
vs.
NANCY M. KETTLER, Respondent.

Mining Claim—Location—When Relocation is Valid—Adverse Suit.

1. Where sufficient annual assessment work is done on a particular claim to represent such claim, and contention is made by a junior locator that the work was done for the purpose of representing several claims and for that reason was insufficient to represent the particular claim, in determining the sufficiency of the work the court will apply the labor shown to have been done to the particular claim upon which the work was done.

2. Mineral ground covered by a valid location becomes segregated from the public domain and is the property of the locator, and so long as the locator complies with the laws of the United States and the state and local regulations, such locator has the exclusive right and enjoyment to all the surface included within the lines of the location against all the world; and during such time such ground so segregated is not open to location by another, and any relocation of such ground during such time is void.

3. In an adverse suit, under the provisions of sec. 2326, U. S. Rev. Stat., a person who has initiated a right to a mining claim,
332 recorded his location notice and performed the other acts made necessary by law, and who makes application for a patent, will be entitled to a patent unless adverse rights are set up in the mode provided by the section.

4. A senior locator, possessed of a paramount right in mineral land for which a patent is sought, may abandon such right and thereby render the ground covered by such location subject to relocation before the expiration of the statute of limitations prescribed, within which the annual labor must be performed.

5. Ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if at the time when the junior location was made there had been an actual abandonment of the claim by the first locator; but at the time such junior location is made the ground must be open to location under the mineral laws of the United States.

6. Upon application for patent a junior locator, as against the senior location, or a third location as against the junior location, may show that the ground covered by the senior location had become a part of the public domain so as to be subject to relocation, even before the expiration of the statutory period for performing the annual labor, by showing that there has been an actual abandonment of the claim by the first locator.

7. In an application for a patent by a junior locator, upon failure of the senior locator to adverse, it will be presumed that there was no senior location, and that at the time the junior location was made the ground was open to entry under the mineral laws of the United States; but where it also appears that there is a third location made subsequent to the junior location, such third locator
333 may adverse the application for patent by the junior locator, and show that the junior location is void because at the time it was made the ground was not open to location under the mineral laws of the United States.

(Syllabus by the Court.)

Appeal from the District Court of the Fourth Judicial District in and for Blaine County.

Hon. Edward A. Walters, Judge.

Application for patent to mineral ground by appellant. Respondent adverses. Judgment for respondent. Affirmed.

John M. Zane, Stockslager & Bowen for appellant.

Sullivan & Sullivan, McFadden & Broadhead, and Frank Reeves for respondent.

STEWART, *J.*:

On January 10, 1908, Nancy M. Kettler filed the field notes and a diagram of the survey of Malta No. 1 mining claim, and also an application for a patent for said mining claim, in the United States land office at Hailey, and caused the register of said office to give notice of said application for patent by publication as required by law, and within sixty days' period of publication the plaintiff filed in said land office a protest and adverse claim as provided by sec. 2326 of the Rev. Stat. of the United States, and within the time provided by said section brought this action for the purpose of determining the question of the right of possession to the land in-
334 volved in the adverse claim. The cause was tried to the district court. Findings of fact and conclusions of law were made and a decree rendered in favor of the respondent, adjudging her to be the owner and in the possession and entitled to the possession of Malta No. 1 mining claim, and to each and every portion thereof, including the area alleged by the plaintiff (appellant here) to be in conflict with Independence No. 2 mining claim. A motion

for a new trial was made and overruled and this appeal is from the judgment and the order overruling the motion for a new trial.

To better understand the questions involved in this case, it may be stated that Emma No. 2 and Malta No. 1 mining claims are north and south locations, while Independence and Independence No. 2 mining claims are east and west locations; and that the conflict between Malta No. 1 and Independence No. 2 arises by reason of the fact that the southern end of Malta No. 1 laps over the western end of Independence No. 2.

The principal questions arising upon the record are as follows: The appellant contends that the assessment work for the year 1888 was not done upon Emma No. 2, and for that reason the ground covered by such location became forfeited and was open to relocation on January 3, 1889, the date Independence No. 2 was located; while respondent contends that the assessment work on Emma No. 2 was done for the year 1888 and that there was no forfeiture, and that the ground covered thereby was not open to relocation on January 3, 1889, and for that reason the Independence No. 2 location was illegal and void as to the area in conflict. It is also contended upon the part of the appellant that even though the assessment work on Emma No. 2 was done for the year 1888 and each subsequent year thereafter up to 1903, yet the failure to do such assessment work in the year 1903 inured to the benefit of the Independence No. 2 location and immediately worked a forfeiture of Emma No. 2 and made Independence No. 2 a valid location; while respondent contends that upon the failure to do the assessment work on the Emma No. 2 for the year 1903, the ground covered thereby was forfeited and became part of the public domain and was open to relocation, and that the only way an interest could be acquired therein or the right to the possession of the same was by a relocation of such ground; and that respondent having relocated the ground as Malta No. 1 thereby acquired the right to the possession of such ground, and that the Independence No 2 location did not become valid as to the area in conflict.

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Respondent also contends that the appellant is estopped to claim title to the area in conflict, because of his acts and conduct in aiding and assisting in the location and staking of Malta No. 1 by respondent and her grantors; while appellant claims that estoppel is not plead and that the facts do not establish estoppel.

Taking up these contentions in connection with the assignments of error, we think it must be conceded that if the assessment work was not done on Emma No. 2 for the year 1888, that the ground embraced within the lines thereof became subject to relocation on January 1, 1889, and that the location of Independence No. 2 could have been legally made, overlapping and covering any part of the boundaries of Emma No. 2 as might be embraced within the description of the location of Independence No. 2. The court finds that the owners of Emma No. 2 performed more than $100 worth of labor and improvements upon said mining claim for the development of said claim, and the work so performed did actually and beneficially develop said mining claim.

336 Counsel for appellant assigns as error this finding and contends that the evidence does not support such finding. Upon this issue the evidence of the appellant was merely of a negative character and to the effect that the appellant's witnesses did not see any work done upon this claim for the year 1888, although they were watching for the same and saw no evidence of any work having been done. The evidence on the part of the respondent was to the effect that in the month of December, 1888, $175 worth of work was done on this particular claim, describing such work. Others testified they saw a party there working. In a case of this kind where a forfeiture is claimed, the burden is upon the person claiming the forfeiture, and in this case with the appellant, and we think there is sufficient evidence to support the finding of the court to the effect that the assessment work was performed on Emma No. 2 for the year 1888. Hammer v. Garfield Min., etc. Co., 130 U. S. 291, 32 L. Ed. 964; Quigley v. Gillett, 101 Cal. 462; Beals v. Cone, 62 Pac. 948; 2 Lindley on Mines, sec. 645.

But it is further contended on the part of the appellant that the work done on Emma No. 2 for the year 1888 was intended to represent three different claims, and for that reason there was not sufficient work done on Emma No. 2 to represent that claim. The rule, however, as we understand it, is that where sufficient labor has been performed on a claim to represent a single claim, and it is contended by a junior locator that the work was done for the purpose of representing several claims, and for that reason was insufficient to represent the particular claim, that in determin-g the sufficiency of the labor the court will apply the labor done to the particular claim upon which the work was done. Fredericks vs. Klauser, 96 Pac. 679; Costigan on Min. Law, pp. 379-380.

337 But taking the evidence as a whole, we are satisfied that the finding of the court is supported by the evidence to the effect that the annual assessment work was done upon and for the benefit of Emma No. 2 for the year 1888.

If, then, the assessment work was done on Emma No. 2 for the year 1888, the question arises whether or not a valid location could be made overlapping and taking in any part of the ground covered by such location. Before considering this question, it is proper to consider the findings of the court which are challenged by the appellant, to the effect that the discovery of the Independence No. 2 was made upon ground included within Emma No. 2. This court has often announced that when there is a substantial conflict in the evidence, and sufficient evidence to support the lower court's finding, the same will not be disturbed. But in this case counsel for appellant contend that there is no substantial conflict in the evidence as to the location of the discovery of Independence No. 2; and that the evidence is not sufficient to show that such discovery was within the boundary lines of Emma No. 2. This contention of appellant is based upon the claim that the lines of Malta No. 1 and Emma No. 2 are not the same, and that the west line of Malta No. 1 is farther west and south than the old line of Emma No. 2.

It appears that prior to the location of Independence No. 2, the

west side line of Emma No. 2 was flush with the east end line of Independence, and that when Independence No. 2 was located the east end line of Independence was readjusted and drawn to the west, thereby making the west end line of Independence No. 2 west of and not flush with the west side line of Emma No. 2. Appellant claims that the discovery of Independence No. 2 was upon
338 this ground and not within the boundary line of Emma No. 2. It is clear from the evidence that the discovery of Independence No. 2 was made upon ground at one time covered by the Independence location or Emma No. 2. We think it was within the power of the owners of Independence to readjust the east end line and draw in such line and abandon the ground east of such readjusted line, and thereby render the same open to relocation under the mineral laws of the United States. 1 Lindley on Mines, sec's 396, 397, 398.

There is evidence to the effect that the lines of Malta No. 1 and Emma No. 2 are the same. If this be true, then the evidence supports the finding of the court to the effect that the discovery of Independence No. 2 was upon ground covered by Emma No. 2 location. It appears that prior to the location of Emma No. 2 the west side line of Emma No. 2 and the east end line of Independence were flush, and that there was no unoccupied ground between Emma No. 2 and Independence; and that upon the location of Independence No. 2 the locators readjusted and drew in the east end line of Independence to the west, and that at no time was there any vacant unoccupied mineral ground between the west side line of Emma No. 2 and the east end line of Independence except in the interim between the readjustment of the east end line of Independence and the location of such ground as a part of Independence No. 2. But in the view we take of this case, it can make no difference whether the discovery of Independence No. 2 was upon ground covered by Emma No. 2 or upon ground west of the west side line of Emma No. 2 and upon ground at the tiue of the discovery covered by Independence, for in either event it would not open to entry as a part of Independence No. 2 ground covered and segregated by another valid location. In other words, a person cannot go upon unoccupied mineral ground and make a discovery and use such discovery for the purpose of overlapping and relocating ground covered by another valid location.

339 It could serve no good purpose in this case to set out in this opinion the evidence showing that the discovery of Independence No. 2 was upon Emma No. 2 and that the lines of Malta No. 1 and Emma No. 2 were identical, but we find sufficient evidence in the record to support these findings of the court.

The real and important question in this case, then, arises out of the following facts as found by the trial court: Emma No. 2 mining claim was located in the year 1881 as a north and south location, and the annual assessment work was performed up to the close of the year 1903. The Independence No. 2 mining claim was located as an east and west location on January 3, 1889, the discovery point of which was within the lines of Emma No. 2. The assessment work

was not performed on Emma No. 2 for the year 1903. On January 1, 1904, the Malta No. 1 mining claim was located upon the lines of the Emma No. 2 and embraced the identical ground covered by the Emma No. 2. Under these facts, in whom does the title and right of possession to the ground in conflict between the Independence No. 2 and Malta No. 1 rest, with the appellant as the owner of Independence No. 2, or with the respondent as owner of Malta No. 1?

From this state of facts, we have a case where a mineral location is made upon land that is already covered by a valid mineral location; and after the junior location is made, the senior location becomes abandoned and forfeited, after which the ground embraced in the senior location is located by a third party; and the contest arises between the third locator and the junior locations covering a part of the same area. In determining this question it is unnecessary to determine the validity of the respective locations, except in so far as the same affects the ground in conflict.

340 Until the case of Lavagnino v. Uhlig, 198 U. S. 443, 46 L. Ed. 1119, it was generally considered by the courts in the mining states and text writers, that mineral ground covered by a valid location becomes segregated from the public domain and the property of the locator, and so long as the locator complies with the laws of the United States and the state and local regulations, such locator has the exclusive right and enjoyment to all the surface included within the lines of the location, against all the world; and that during such time such ground so segregated is not open to discovery and location by another, and that any relocation of such ground, during such time, is void. Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Gwillim v. Donnellan, 115 U. S. 45, 29 L. Ed. 348; St. Louis Min. Co. v. Montana Min. Co., 171 U. S. 650, 43 L. Ed. 320; Brown v. Killabrew, 21 Nev. 438.

Counsel for appellant, however, contend that this rule has been changed, and that in the case of Lavagnino v. Uhlig, supra, a different rule has been announced by the supreme court of the United States. The Lavagnino case was an adverse suit, as is the case at bar. The facts of that case, as we gather them from the opinion, are as follows: Application was made for patent for Uhlig No. 1 and Uhlig No. 2 mining claims, located on January 1, 1889. Adverse was filed by the owners of Yes You Do mining claim. It was contended that at the time the Uhlig claims were located there was a subsisting, valid location known as Levi P. claim which included within its area the land in dispute in the adverse; and that the Levi P. claim became forfeited by reason of the failure to perform the annual assessment work thereon for the year 1897, and acquired the status of unoccupied mineral lands on January 1, 1898, the date when the Yes You Do claim was located; and in considering the questions involved in that case, the court conceded that the

341 Levi P. location, of which the Yes You Do purported to be a relocation, was prior in date to the location of the Uhlig Nos. 1 and 2, and that there were areas in conflict between them; and the question arose as to whether the locator of the Yes You Do mining

claim stood in such a relation as to enable the locator or his grantees to successfully adverse the application for patent made by the owners and possessors of the Uhlig locations, and the court states the question as follows:

"The question then is, where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?

"To say that the relocator had such right involves, necessarily, deciding that, as to the area in conflict between the junior and the senior locations, the junior could acquire no present or eventual right whatever, and that, on the abandonment or forfeiture of the senior claim, the area in conflict became, without qualification, a part of the public domain. In other words, the proposition must come to this: that as the junior locator had acquired no right whatever, present or possible, by his prior location, as to the conflicting area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto a new right, accompanied with a performance of those acts which the statute renders necessary to make a location of a mining claim.

"The deductions just stated are essential to sustain the
342 right of the locator of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and alleged senior location, for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on the forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two would be operative upon the area in conflict on a forfeiture of the senior location. If it had that effect it necessarily was prior and paramount to the right acquired by a relocation of the forfeited claim.

"But we do not think that the deductions which we have said are essential to sustain the right of the relocator to adverse, under the circumstances stated, can be sustained consistently with the legislation of Congress in relation to mining claims."

The court then quotes sec. 2326 of the Rev. Stat. U. S. and concludes that this section recognizes that a person, who has initiated a right to a mining claim, recorded his location notice and performed the other acts made necessary by law, and who makes appication for a patent, will be entitled to a patent unless adverse rights are set up in the mode provided by the section; and that a senior locator possessed of a paramount right in the mineral land, for which a patent is sought, may abandon such right and cause it in effect to inure to the benefit of the applicant for a patent by failure to adverse, and that if before abandonment or forfeiture of the Levi P. claim, the owners of Uhlig locations had applied for patent, and the owners of Levi P. had not adversed the application, upon an

establishment of a prima facie right in the owners of Uhlig
343 claims, the presumption would have arisen that no conflict existed, and that as to third persons, the land was not unoccupied public land of the United States; but, as to such persons from the time of the location, by the applicant for the patent, was land embraced within such location and not subject to be acquired by another person; and that inasmuch as the issue had reference only to the conflicting area and the invalidity of the Uhlig locations, in respect to the premises in dispute, the land embraced within the location of the Uhlig claims was not unoccupied mineral lands of the United States at the time the Levi P. claim was relocated as the Yes You Do claim, and was not subject to relocation as the Yes You Do claim.

It seems to be held in the Lavagnino case that a forfeiture of a senior location, prior to the junior locator's application for a patent, inures to the benefit of the junior locator in so far as the area in conflict is concerned; and that one who relocates the area covered by the senior claim, after forfeiture, cannot successfully adverse the junior locator's application for patent. This case seems to be based upon the provisions of sec. 2326 of the Rev. Stat. of the United States and has reference to the right to adverse and involves a question of practice.

While it is true the court seems to announce, in deciding the case, a rule different from that announced in Belk v. Meagher, yet this conclusion arises in determining a question of practice; and we are led to the belief that while the two cases seem to be in conflict, yet it was not the intention of the court in the Lavagnino case to overrule the case of Belk v. Meagher. We are strengthened in this conclusion by the fact that in the Lavagnino case the court does not refer to Belk v. Meagher or discuss the rule anounced in that
344 case, or indicate in any way that it was the express intention to overrule or modify Belk v. Meagher. We are convinced that the case of Belk v. Meagher has been the law so long and has been recognized by the courts of all the mining states as well as the supreme court of the United States, as announcing the true rule, that the same court would not have anounced a rule in conflict with that case without directing its attention to that case or in some way indicating its express intention to announce a different rule. We must confess that it is somewhat difficult to reconcile the rule announced in the Lavagnino case with that announced in Belk v. Meagher, but in the more recent case of Brown v. Gurney, 201 U. S. 184, 50 L. Ed. 717, an adverse suit in which the Lavagnino case was cited by counsel as authority, the supreme court of the United States, speaking through Chief Justice Fuller, says:

"Of course it is essential that at the date of a location the ground located on should be part of the public domain, and in the present case the specific question affirmatively raised was whether the ground in controversy was a part of the public domain at the time of the respective contested locations.

"It seems to us that when the Scorpion locator attempted to make that location he conceded the validity of the Kohnyo location and

the segregation by that location from the public domain of the southerly portion of that claim."

And the court further remarks:

"We again state the dates of the respective locations. The Scorpion was located May 13, 1898. The Hobson's Choice was located June 23, 1898. The location of the P. G. was July 16. Thus it is seen that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice was located when the premises had reverted to the public
345 domain; and that the location of the P. G. was after that date."

Later the case of Farrell v. Lockhart, supra, reached the supreme court of the United States, 210 U. S. 142, 52 L. Ed. 994, and the Lavagnino case was discussed; and while the court in the opinion states, "We do not pause to particularly re-examine the reasoning expressed in the opinion in Lavagnino v. Uhlig as an original proposition, yet, after referring to the case of Belk v. Meagher and Brown v. Gurney, supra, the court said:

"We think the opinion in the Lavagnino Case should be qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that, at the time such prior location was made, the ground embraced therein was covered by a valid and subsisting mining claim. It is to be observed that this qualification but permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. It does not, therefore, include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if, at the time of such second location, there had been an actual abandonment of the original senior location. We say this, because—taking into view Belk v. Meagher, Lavagnino v. Uhlig, and Brown v. Gurney—we are of the opinion, and so hold, that ground
346 embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator."

As we understand it, the court holds that an adverse upon application for patent by a junior locator, as against the senior locator, or a third location as against the junior location, may show that the ground covered by the senior location had become a part of the public domain so as to be subject to relocation even before the expiration of the statutory period for performing the annual labor, by showing that there had been an actual abandonment of the claim by the first locator. This rule, however, does not change the principle announced in Belk v. Meagher, supra, to the effect that until a location is terminated by abandonment or forfeiture, no right or

claim to the property can be acquired by an adverse entry thereon with a view to the relocation of the same. If it can be shown that at the time a junior location is made the senior location has actually been abandoned, then, of course, the area would be a part of the public domain at the date of the junior location and be open to entry. If, on the other hand, the area covered by a senior location has not been abandoned or forfeited at the time the junior location is made, then, of course, at the time of the junior location it would not be a part of the public domain and therefore not subject to relocation, and such relocation as to such area would be void. In the case at bar, so long as the Emma No. 2 claim was not forfeited or abandoned, the conflict area between it and the Independence No. 2 was not subject to relocation by anyone but remained segre-
347 gated and a part of Emma No. 2. If, however, such area in conflict became abandoned or forfeited under the Emma No. 2 location, it would not become a part of Independence No. 2, although within the surface boundaries thereof, but would revert to the public domain and would be subject to relocation by anyone who desired to relocate the same. The inchoate title and right of possession acquired by the senior locator would revert to the United States, the owner of the fee, by operation of law; and another claimant must acquire his rights from the owner of the fee.

The owners of Independence No. 2 might have made such territory a part of Independence No. 2 by filing an additional or amended location certificate as prescribed by law, or making an entirely new location covering such territory. Such steps, however, not having been taken and nothing having been done by the Independece No. 2 locators to connect such location with the area in conflict after its forfeiture, and after it had become subject to relocation, and the locators of Malta No. 1 having located a claim embracing the area in conflict, such area thereby became segregated as a part of the Malta No. 1 location and the locators of Independence No. 2 acquired no right to such area under the Independence No. 2 location.

This is the principle, as we understand it, announced in Belk v. Meagher, and we are inclined to believe it is the rule reaffirmed in Farrell v. Lockhart and Brown v. Gurney, supra. If the contention made by appellant should be sustained, in our judgment it would subject to relocation every valid mining claim and make the relocation of mining claims purely a speculative business and lead to fraud and misrepresentation. If ground covered by a valid, subsisting mining claim is subject to relocation, and in case the senior locator thereafter fails to comply with the law and there is an abandonment or forfeiture, such forfeiture or abandonment inures
348 to the benefit of the junior locator and thereby renders the junior location valid as to the area in conflict, then it would be a profitable business for a person to go into the profession of relocating mining claims and not wait until there was in fact a forfeiture or abandonment. We, however, are unable to make this deduction either from the statute or the decisions of the supreme court of the United States and are of the opinion that where a valid mining location has been made, by such location the ground is segre-

gated and withdrawn from entry and location so long as the locator complies with the laws of the United States. If, however, at any particular time there should be a forfeiture or abandonment of the ground covered by such location, then the same is open to relocation as though it were virgin territory; and if any part of the area embraced within senior and junior locations is thereafter covered by a third location, that the third locator may show that at the time the junior location was made the ground was not subject to relocation and was a part of and within the boundaries of a valid, subsisting location; and as against such third location it must appear that the ground in conflict was open to the relocation at the time such relocation was made, and that upon application for a patent by the junior locator, where the senior locator does not adverse, it will be presumed that he ground was open to relocation at the time the relocation was made. But where an adverse is filed by a third locator claiming all or any part of the ground in conflict, such third locator may show that at the time the relocation was made the ground in conflict was not open to location by reason of the fact that the senior location was a valid and subsisting location, and that it was in respect to the right to adverse and the showing that might be and was required to be made with which the court was dealing and with reference to which the court intended to decide in the Lavagnino
349 case. We believe this position is clearly supported by the leading authorities dealing with the question. Rose v. Richmond Min. Co., 27 Pac. 1105; Hoban v. Boyer, 85 Pas. 837; Lockhart v. Farrell, 86 Pac. 1077; Nash v. McNamara, 93 Pac. 405; Moorehead v. Erie Min. & Mill. Co., 96 Pac. 253; Montague v. Labay, 2 Alaska 575; Souter v. McGuire, 78 Cal. 543; Book v. Justice Min. Co., 58 Fed. 106; McCulloch v. Murphy, 125 Fed. 147; Zerres v. Vanina, 134 Fed. 610; Wilson v. Freeman, 68 L. R. A. 833, (note).

The record discloses a number of other assignments of error, all of which we have carefully examined. Many of them we find are not well founded and a consideration of the same would not lead to a reversal of this case. The others are covered by the discussion in this opinion.

Appellant urges very strongly that the trial court erred in its findings with reference to the facts and the deduction made therefrom by counsel for respondent, that the appellant is estopped from claiming any interest in the ground in conflict. If we are correct in our conclusion that the appellant acquired no interest or title or right of possession to the ground in conflict, by reason of the Independence No. 2 location, and that the respondent acquired title and right of possession by virtue of Malta No. 1, then the question of estoppel becomes of no consequence in this case. It is a matter of entire indifference and wholly immaterial whether the appellant is estopped to deny the respondent's title to the ground in conflict by reason of his acts and conduct in pointing out to the respondent the lines of the Emma claim and siding, without objection, to the location of Malta No. 1 and without making claim to any part of the ground covered by such location. For this reason it is entirely

unnecessary to discuss or consider the question of estoppel, as whatever view this court might take of this question could make no difference as to the result finally to be reached.

350 The judgment in this case is affirmed. Costs awarded to the respondent.

Ailshie, J., concurs.

Sullivan, C. J., did not sit at the hearing or participate in this opinion.

351 In the Supreme Court of the State of Idaho.

CHARLES SWANSON, Appellant,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Respondents.

*Petition for Rehearing.*

John M. Zane, Stockslager & Bowen, Attorneys for Appellant.
Sullivan & Sullivan, Frank Reeves, Attorneys for Respondent.

352 In the Supreme Court of the State of Idaho.

CHARLES SWANSON, Appellant,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Respondents.

*Petition for Rehearing.*

Comes now the appellant, Charles Swanson, by his attorneys, and respectfully petitions for a re-hearing and a reconsideration of the above case, and particularly with reference to the question as to whether there is sufficient evidence to justify the trial court's findings as to the Malta No. 1 and Emma No. 2, covering the same ground.

The trial court found in finding No. 9 (Fol. 130), in No. 29 (fol. 162) and in No. 30 (fol. 166) and in No. 33 (fol. 174), that the Malta No. 1 claim as surveyed is identical with the Emma No. 2 (the pre-existing claim) and that the corners and lines of the latter claim were practically the same as the corners and lines of the Malta No. 1 as surveyed for patent.

Special exceptions were taken to these findings, and this question of fact was discussed orally and both in our first and reply brief.

*Court's Opinion.*

Mr. Justice Stewart, in delivering the opinion of the Supreme Court in this case, has apparently overlooked the grave importance of this question of fact. In such decision the court says:

"The principal question arising upon the record are as follows: The appellant contends that the assessment work for the year 1888

was not done upon the Emma No. 2, and for that reason the ground covered by such location became forfeited and was open to
353 relocation on January 3, 1889, the date Independence No. 2 was located; while respondent contends that the assessment work on Emma No. 2 was done for the year 1888, and that there was no forfeiture, and that the ground covered thereby was not open to relocation on January 3, 1889, and for that reason the Independence No. 2 location was illegal and void as to the area in conflict. It is also contended upon the part of the appellant that even though the assessment work on Emma No. 2 was done for the year 1888 and each subsequent year thereafter up to 1903, yet the failu*e*r to do su*hc* assessment work in the year 1903 inured to the benefit of the Independence No. 2 location and immediately worked a forfeiture of Emma No. 2 and made Independence No. 2 a valid location; while respondent contends that upon the failure to do the assessment work on Emma No. 2 for the year 1903, the ground covered thereby was forfeited and became part of the public domain and was open to relocation, and that the only way an interest could be acquired therein or the right to the possession of the same was by a relocation of such ground; and that respondent having relocated the ground as Malta No. 1 thereby acquired the right to the possession of such ground, and that the Independence No. 2 location did not become valid as to the area in conflict."

It seems that this court considered the question as to the identity of these two claims only of incidental importance, bearing, if at all, on the question as to whether the situs of the discovery of Independence No. 2 would effect the legal question as to whether the forfeiture and abandonment of the Emma in 1903 would cause such ground to inure to the benefit of the Independence No. 2. The opinion in discussing this assignment of error does so in connection with the legal question above stated. The Court says:

"It appears that prior to location of Emma No. 2 the west side-line of the Emma No. 2 and the east end-line of the Independence were flush, and that there was no unoccupied ground between Emma No. 2 and Independence; and that upon the location of Independence No. 2 the locators readjusted and drew in the east end-line of the Independence to the west, and that at no time was there any vacant unoccupied mineral ground between the west side-line of Emma No. 2 and the east end-line of Independence except in the interim between the readjustment of the east end-line of Independence and the location of such ground as a part of Independence No. 2. But in the view we take of this case, it can make no difference whether the discovery of the Independence No. 2 was upon ground covered by Emma No. 2 or upon ground west of the west side-line of Emma No. 2 and upon ground at the time of the discov-
354 ery covered by Independence, for in either event it would not open to entry as a part of Independence No. 2 ground covered and segregated by another valid location. In other words, a person cannot go upon unoccupied mineral ground and make a discovery and use such discovery for the purpose of overlapping and re-locating ground covered by another valid location.' "

The Court does not undertake to justify the findings of the trial court, deeming the same unnecessary, saying:

"It could serve no good purpose in this case to set out in this opinion the evidence showing that the discovery of Independence No. 2 was upon Emma No. 2 and that the lines of Malta No. 1 and Emma No. 2 were identical, but we find sufficient evidence in the record to support these findings of the Court."

From these quotations we take it for granted that this Court deemed the question as to identity of the two claims unimportant, and we, therefore, assume that perhaps for this reason this Court did not give as much study and attention as it would a question deemed important to a determination of the controversy.

*Importance of Question of Fact.*

Instead of being of minor importance, the question as to the identity of the Malta No. 1 and Emma No. 2 is the all important question in the appeal, and this is so, irrespective of the views of the Court as to other legal questions involved. As a matter of fact, had the Malta claimants never claimed other ground than that formerly included within the Emma claim, it is probable that no suit would have been instituted; and at any rate, had the trial court not granted to respondents ground not covered by the Emma claim, it is quite certain that no appeal would have been prosecuted.

Of course, this case was tried and appeal taken by appellant upon the theory that he was entitled to all of the grounds embraced within the lines of his location—the Independence No. 2—both because, as we claimed, the assessment work on the Emma No. 2 was not performed for the year 1888, and for the reason, as
355 we contended, that the admitted abandonment of the Emma in 1903 caused the ground to inure, as a matter of law, to the Independence No. 2; but the real complaint of the appellant, the real reason why he believes justice has not been given him, is because the respondent in her application for a patent included ground never a part of the Emma, always a part of the Independence group,—ground made valuable by the appellant, and never sought after by respondent until such ground became of value.

*Right of Malta Claimants to Claim Ground West of Emma Lines.*

The facts in this case are undisputed that, except for the ground embraced within the old Emma claim, the Independence No. 2 claim was legally located,—discovery, markings, recording,—and that the assessment work was regularly performed. These facts are found by the trial court in appellant's favor. Therefore, it follows, "as night the day," that the Independence No. 2 location was valid as to all ground not embraced within the Emma. This proposition is well settled, and has never been disputed by respondent.

Under the rule of law, as announced, by this Court, the Emma ground became open to relocation on January 1, 1904—the labor

for 1903 not having been performed. The Emma ground became vacant and unappropriated public mineral land on that date, and therefore the locators of the Malta had the right to make a relocation of such ground.

Therefore, the respondent would be entitled to the Emma ground and no more, while appellant would be entitled to all ground, not included within the old Emma, and no less.

It is appellant's contention that the Malta No. 1, as surveyed, is west and south of the Emma No. 2 and an examination of the exhibits will show that the area claimed by the Malta, outside of the Emma lines, includes workings of the Independence. The value of a mine is not the surface, but what lies beneath the surface, and it is not the mere surface, outside the Emma lines, of which
356 we complain, but it is the ore bodies which might be taken.

As a matter of information, outside the record, we will say that there is money now tied up in court from the proceeds of ore which respondents claim is taken from ground which we say was not part of the Emma claim.

*Evidence.*

We are very well convinced that the evidence does not sustain the lower court's findings, but on the contrary, shows conclusively the opposite,—evidence introduced by respondent in the case. We would earnestly request a re-hearing, and a re-examination of this evidence upon this question. We think it will clearly appear that respondent is claiming more than she ever had.

We have discussed this question at length in our briefs, but we will renew our argument, calling attention to the record in more detail.

*Original Stakes of the Malta No. 1.*

The Malta No. 1 was located January 1, 1904, by one A. J. Sullivan, who later sold to Mrs. Kettler. Sullivan knew nothing about the old Emma stakes, and paid very little attention to the Malta stakes.

In 1905, John T. Sears, one of the original locators and owners of the Emma No. 2 obtained an interest in the Malta No. 1. He could not find any stakes on the south line of the Malta, and he placed these stakes in position. There they remained for two years, and when the Malta people proposed to patent, these stakes were used for that survey. We quote from Sear's testimony (Fol. 556):

Q. You went there having some interest in the Malta No. 1 claim, did you not?

A. Half interest.

Q. 1905. As co-owner you elected to place these stakes as you say, as you testified in your direct examination?

A. Yes.

Q. You testified in 1905 that when you placed the stakes
357 here you had an interest in the Malta No. 1 claim?

In 1907 a survey was made for patent, and Sears says (Fol. 574.):

"When I placed the stakes there on the south end of the Malta, I placed fir stakes. I marked them at that time in 1905. When Mr. Anderson came up there to make a survey in October, 1907, I did not call his attention to this stake which is near the ridge or saddle on the southeast corner as being one of the corners of the Malta No. 1 location. Part of the time I assisted him in the survey. I knew he was running his lines. When he ran his lines for his survey from this stake and staked the line along the ridge, I was there then. The monument is there yet where he placed the stake of the southwest corner of the first survey. I remember the location."

The exact position and location of the stakes at that time was shown by E. S. Anderson, who made the survey. (Fol. 319). The relative location of this survey and the later survey is shown by the diagram illustrating our argument.

The southwest corner of the present survey of the Malta No. 1 is 200 feet south and 100 feet west of the first survey of the Malta, and where the Malta stakes had been for two years.

### *Moving of the Malta Stake.*

As we have shown, the Malta stakes were for two years 100 feet east, and 200 feet North of the present location. This fact is testified by Mr. Sears, an owner and witness for respondent, and not disputed.

These stakes were moved to their present position in 1907, three years after the location of the Malta.

Mrs. Kettler, the respondent, was not satisfied with the Sears-Anderson survey, and she had Anderson make another survey. She says (Fol. 776):

"Mr. Anderson made two surveys of the Malta No. 1. The first one I went up; he would not allow me to go up the hill, he
358 said it was not permissible for a lady to go along with a bunch of men. When we came down from the first survey I had him go back and make another survey. I set one of the posts, that is the location stake on the end of the claim No. 1.

She even set one of these stakes herself. And she had never seen where the Malta stakes had been placed.

She never was on the Malta ground after the location until 1907. (Fol. 782). Moreover, she never had been near the stakes she presumed to set, in her life. She says (Fol. 804):

"Q. How many times in the eighties prior to 1888 were you on the ground?

A. I think once.

Q. That time in 1882?

A. Yes; I went to see my fortune.

Q. You noticed it so particularly at that time that you could tell in 1907 just where the southwest corner stake stood?

A. Yes, sir, I could.

Q. You are positive of that?

A. I am positive of that location, of the direction from the cabin.

Q. That positive opinion in your mind was fixed by something which you say you knew on the ground in 1882?

A. Yes, sir.

Q. You were not on the ground then from 1882 until, what year?

A. I have been up there a great many times but not over the ground. I go up to the cabin and go around and look. I have been up there since my husband died.

Q. When was the next time you were on the ground, you recollect, from 1882?

A. I cannot recollect.

Q. Were you there at all until after 1889?

A. I don't think so, no.

Q. From 1882 until some time after 1889 you were not on this ground?

A. No, sir, the next time I was on the ground, I think, was some time when we had the bond."

The Tondrow bond was given in 1895 (Fol. 1009), so she had, according to her own testimony, been on the Emma claim twice, once in 1882 and one in 1895, but had only seen the stakes from a distance, and yet she presumed to have a survey different from that of Sears. Sears' survey was made October 3, and her's October 26, 1907. (Fol. 317 & 321).

*Drawing-in of Lines in* 1889.

Prior to 1889, the testimony is undisputed that the east end-line of the old Independence was flush with the west side-line of the Emma. In 1889 the east end-line of the Independence No. 1 was drawn in. This fact is undisputed, and expressly found to be true by the court, as we have pointed out in our brief. We think that, if this be true, the finding of the Court of which we complain was impossible. Both cannot be correct. Mr. Justice Stewart in his opinion recognizes this fact, and if so, we cannot see how the finding of identity between the Malta and Emma can be sustained.

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Surely, this incongruity should be enough to send the case back for adjustment by the trial court. In other words, the trial court should be instructed to find how far the lines had been drawn in, and to adjust the west side-line of the Malta No. 1 to where the Court thus finds the west side-line of the Emma to have been.

Certainly the Malta, as now located and surveyed, is flush with one corner of the Independence No. 1. Prior to 1889, according to Heller, witness for respondent, all the east end stakes of the Independence No. 1 were along the west side-line of the Emma. The witness says and the Court finds that these east stakes were drawn in in 1889. If so, we ask to be shown on what line of logic the Malta can now be held to be identical with the Emma, and still be flush

with the Independence. It is physically, logically and mathematically impossible.

One finding or the other is erroneous, and we submit that, under the circumstances, this court should examine the testimony and ascertain which finding is correct. We submit that it will not be a sufficient answer for the counsel to say that there was a conflict and that the trial court decided that the Emma and Malta were identical, for that is not strictly true. In the first place there was no substantial conflict because all of the testimony points clearly to the fact that the Malta is west of the Emma, and if there is any conflict at all it is between respondent's own witnesses. In the second place, the trial court did not strictly find against our claims. He
360 did not and did not. He finds in one finding against us but in another he finds in our favor, which, under the admitted facts, disproves conclusively the previous finding.

*Cuts on Malta.*

As we have pointed out in our brief, Joseph Heller, a disinterested witness for the respondent, located the line by reason of certain cuts made by him. Counsel for the respondent did not seek to deny our statements nor to argue against our conclusions. If Joseph Heller's testimony regarding these cuts was correct, then it is impossible that the Malta lines should be identical with the Emma. We respectfully call the Court's attention to his testimony and our arguments in this respect, which we deem it unnecessary to repeat. arguments in this respect, which we deem it unnecessary to repeat.

*Evidence for Respondent.*

The opinion of Mr. Justice Stewart, while stating the importance of the findings in question, states that the Supreme Court "finds sufficient evidence to support these findings of the court."

We have again re-examined all the record, and respectfully urge that the Supreme Court must have misapprehended the force and effect of some testimony. Surely no weight can be given to such testimony as Mrs. Kettler's, when she admits she never was within 1000 feet of the south posts prior to 1907, and then only not more than twice, and that many, many years before. Surely no weight can be given to the hearsay testimony of George Havery as to the situs of the S. W. corner of the Emma.

The only witnesses who testified as to the location of the Emma stakes were Charles Swanson, the plaintiff, Erik Anderson, and Robert Warren on behalf of the appellant, and Joseph Heller, John T. Sears, Sam Tucker, George Havery, and Mrs. Kettler, the respondent. Swanson, Anderson, and Warren all agree that the orig-
inal Emma west line was approximately 175 feet east of the
361 east end-line of the present Independence; that the east end-line was drawn in 175 feet in 1889, to within 100 feet of the discovery of Independence No. 1. The Court finds that this draw-

ing-in actually took place, and that the line was established 64 feet east of the discovery of Independence No. 1, or in other words, it was drawn in 215 feet instead of 175 feet.

Joseph Heller, John T. Sears and Sam Tucker each testified that the Independence east end-line was flush with the Emma west-side-line prior to 1889. The Court finds that this east end-line was re-adjusted in 1889, and when that is borne in mind, together with the fact that the witnesses knew nothing of that readjustment, the testimony of these witnesses harmonizes with Swanson, Anderson and Warren, especially that of Heller and Sears.

*Joseph Heller.*

As we have before seen, Heller testifies specifically with reference to certain cuts which corroborates Swanson, Anderson and Warren as to the situs of the Emma west side-line. Heller does say that the southwest corner of the present Malta is about the location of the same corner of the Emma, but he makes this statement on the assumption that the Independence is just as it was in the '80's. If the Independence east end-line was actually 175 or 215 feet east of its present location, then it is clear that Heller would have placed that west side-line of the Emma 175 or 215 east of the Malta west side-line, as he knew the west side-line of the Emma to be flush with the east end-line of the Independence. In his testimony regarding cuts, he absolutely corroborates Swanson, Anderson and Warren, and if we assume the Court's finding to be correct regarding the re-adjustment of the lines, then all of his testimony is in harmony, that is, it harmonizes with his testimony regarding cuts and also harmonizes with the testimony of Swanson, Anderson and Warren.

So the effect of Heller's testimony depends upon the question
362 as to the re-adjustment of the Independence lines in 1889.

If the lines are the same now as they were in 1884 then Heller's testimony is, in one respect, evidence sustaining the Court's finding as to the identity of the Malta and the Emma, but if the lines of the Independence were drawn in in 1889 Heller's testimony, in all respects, absolutely disproves such finding of the Court.

*John T. Sears.*

As we have before shown, John T. Sears placed the Malta stakes 200 feet north and 100 feet east of the present locality and had a survey made to such point after they had remained there for two years. Mrs. Kettler has a new survey, ignoring the stakes set by him. Sears was one of the original locators and owners of the Malta.

Sears also corroborates Heller regarding cuts and also corroborates Swanson, Anderson, and Warren to a very great extent, by actually placing the corners near the correct places.

But, Sears says that the present location of the Malta southwest corner is near the same corner of the Emma, that he changed his mind in 1907, but he did so on the assumption that the Independence



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east end-line was flush with the Emma west side-line, and consequently, the Malta stakes should be moved west accordingly; but he did not know of the re-adjustment of the Independence lines in 1889.

The same things we have said about Heller's testimony apply with equal force to the testimony of Sears. It all depends upon the question as to whether the Independence east end-line was in fact drawn in in 1889. If it was not, then Sears' testimony, in one respect, (his present opinion) sustains the findings in question; if it was drawn in then Sears also harmonizes and corroborates Heller, Swanson, Anderson and Warren, in all respects.

*Samuel Tucker.*

Tucker disputes Heller and Sears regarding all the cuts
363 except the Heller and Sears cut, being off of Emma ground, but he says the Independence was flush with the Emma prior to 1889. He knew nothing of the drawing-in in 1889. Hence, the same remarks apply here as in the case of Heller and Sears.

*George Havery.*

Havery also testified with regard to the south stakes of the Emma. He says that the southeast corner of the Malta is about where the same corner of the Emma was. He also says the same about the southwest.

But, as to the southeast, that is not of very much value, it is the position of the southwest of which we complaint.

As to the southwest Havery's testimony proved to be hearsay. (Fol. 871).

*Mrs. Kettler.*

Mrs. Kettler was very positive as to the location of the south stakes, but her testimony deserves no credit under any circumstances. She showed that she was in no position to know hence she could not know.

*Summed Up.*

The evidence to sustain the findings is all in the testimony of Mrs. Kettler and George Havery. Assuming that the lines of the Independence No. 1 were re-adjusted in 1889, then, as we have seen, all the testimony of Heller and Tucker disprove the finding in question and corroborates our contention. The trial court found that this re-adjustment actually took place, hence we say that if the findings in question are sustained at all they must be by the testimony of George Havery and Mrs. Kettler. Mrs. Kettler could not know and did not know enough about the stakes to be of value. Her knowledge of the position of the southwest corner of the Emma came from

having it pointed out to her 25 years before. Havery's testimony was hearsay.

363½ To disprove the findings of the Court we have the testimony of Swanson, Anderson, and Warren, the findings of the Court, the cuts made by Heller and Sears, the fact that the Malta stakes were set south and east for two years. In other words, if the Independence lines were drawn in in 1889, we have Swanson, Anderson, Warren, Heller, Sears and Tucker against Havery's hearsay testimony and Mrs. Kettler's views obtained 25 years before and 1000 feet away.

As we have said before, the mere fact that the Independence lines were drawn in in 1889, disprove the findings in question, and for the reason advanced above, we earnestly request the Court that the matter be re-examined and that the decree of the trial court be modified, giving to appellant all the ground west and south of the Emma, included within the disputed area, or that it be remanded to the trial court for a new trial or a modification of the decree.

Respectfully submitted,

STOCKSLAGER & BOWEN,
*Attorneys for Appellant.*

[Endorsed:] No. 1596. In the Supreme Court of the State of Idaho. Charles Swanson, Appellant, v. John T. Sears et al., Respondents. Appellant's Petition for Rehearing. Filed this 17 day of Dec. 1909. I. W. Hart, Clerk.

364 In the Supreme Court of the State of Idaho.

CHARLES SWANSON, Appellant,
vs.
NANCY M. KETTLER et al., Respondents.

*Respondent's Petition for Rehearing on Estoppel.*

Respondent prays for a rehearing on the question of estoppel raised by her and presented in the record, but on no other point.

In disposing of this cause and in affirming the judgment of the Court below it is said, at the conclusion of the opinion filed, by this Court, that in view of the conclusions reached the question of estoppel becomes of indifference, and for this reason the question was not decided.

This is true, of course, so far as this court is concerned, but it is of great and manifest importance to respondent in view of a possible writ of error sued out by the appellant from the United States Supreme Court.

We think the rule in that Court is this: Where the judgment of the highest state court rests exclusively on a federal question the United States Supreme Court has undoubted jurisdiction in cases such as the one at bar, but where it also rests on an independent ground, sufficient to support the judgment rendered, even though a federal question was involved and decided, no jurisdiction attaches.

Other grounds of decision.—"It is axiomatic," said the court in California Powder Works v. Davis, (1894) 151 U. S. 389, 393, "that in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction but that its decision was necessary to the determination of the cause that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented."

365 To the same effect:

Eustis v. Bolles, (1893) 150 U. S. 361.
Missouri Pac. R. Co. v. Fitzgerald, (1896) 160 U. S. 556.
Mills v. Brown, (1842) 16 Pet. (U. S.) 525.
California Powder Works v. Davis, (1894) 151 U. S. 389.
Roby v. Colehour, (1892) 146 U. S. 153.
Adams County v. Burlington, etc., R. Co., (1884) 112 U. S. 123.
Williams v. Norris, (1827) 12 Wheat. (U. S.) 117.
Hickie v. Stark, (1828) 1 Pet. (U. S.) 94.
Wilson v. Black Birk Creek Marsh Co., (1829) 2 Pet. (U. S.) 245.
Satterlee v. Matthewson, (1829) 2 Pet. (U. S.) 380.
Harris v. Dennie, (1830) 3 Pet. (U. S.) 292.
Davis vs. Packard, (1832) 6 Pet. (U. S.) 41.
Commercial Bank v. Buckingham, (1847) 5 How. (U. S.) 317.
Furman v. Nichol, (1868) 8 Wall. (U. S.) 44.
Brown v. Atwell, (1875) 92 U. S. 327.
Citizens' Bank v. Board of Liquidation, (1878) 98 U. S. 140.
Boughton v. Exchange Bank, (1881) 104 U. S. 427.
M'Bride v. Hoey, (1837) 11 Pet. (U. S.) 167.
Williams v. Oliver, (1851) 12 How. (U. S.) 111.
Gibson v. Chouteau, (1868) 8 Wall. (U. S.) 31–.
Klinger v. Missouri, (1871) 13 Wall. (U. S.) 257.
Steines v. Franklin County, (1871) 14 Wall. (U. S.) 15.
Kennebec R. Co. v. Portland R. Co., (1871) 14 Wall. (U. S.) 23.
Commercial Bank v. Rochester, (1872) 15 Wall. (U. S.) 639.
Jenkins v. Loewenthal, (1884) 110 U. S. 222.
Jacks v. Helena, (1885) 115 U. S. 288.
Hale v. Akers, (1889) 132 U. S. 554.
Beatty v. Benton, (1890) 135 U. S. 244.
Haley v. Breeze, (1892) 144 U. S. 130.
Eustis v. Bolles, (1893) 150 U. S. 361.
Winter v. Montgomery, (1895) 156 U. S. 3–5.

Gillis v. Stinchfield, (1895) 159 U. S. 658.
Seneca Nations v. Christy, (1896) 162 U. S. 283.
Dibble v. Bellingham Bay Land Co. (1896) 163 U. S. 63.
Bacon v. Texas, (1896) 163 U. S. 207.
State v. Bachelder, (1863) 1 Wall. (U. C.) 109.
Crosley v. New Orleans, (1882) 108 U. S. 105.
Murdock v. Memphis, (1874) 20 Wall. (U. S.) 590.
Henderson Bridge Co. v. Henderson, (1891) 141 U. S. 679.
Delaware City, etc., Steamboat Nav. Co. v. Reybold, 1892, 142 U. S. 636.
Brown v. Massachusetts, (1892) 144 U. S. 573.
Hammond v. Johnston, (1891) 142 U. S. 73.
Seeberger v. McCormick, (1899) 175 U. S. 274.
Remington Paper Co. v. Warson, (1899) 173 U. S. 443.
Allen v. Southern Pac. R. Co., (1899) 173 U. S. 479.
Capital Nat. Bank v. Cadiz First Nat. Bank (1899) 172 U. S. 636.
Pierce v. Somerset R. Co., (1898) 171 U. S. 641.
Harrison v. Morton, (1898) 171 U. S. 38.
366 Cook County v. Calumet, etc., Canal, etc., Co., (1891) 138 U. S. 635.
Beupre v. Noyes, (1891) 138 U. S. 397.

And this even though the Supreme Court might think the position of the state court an unsound one.
Klinger v. Missouri (1871) 13 Wall. (U. S.) 263.

In Rutland R. Co. v. Central Vermont R. Co., (1895) 159 U. S. 630, it is stated, "that where a state court in rendering judgment decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to support the judgment this court will dismiss the writ of error without considering the federal question."

To the same effect are:
Capital Nat. Bank v. Cadiz First Nat. Bank, (1899) 172 U. S. 425.
Harrison v. Morton, (1898) 171 U. S. 38.
Pierce v. Somerset R. Co., (1898) 171 U. S. 641.
Wade v. Lawder, (1897) 165 U. S. 624.
Bacon v. Texas, (1896) 163 U. S. 207.
Seneca Nation v. Christ, (1896) 162 U. S. 283.
Gillis v. Stinchfield, (1895) 159 U. S. 658.
Rutland R. Co. v. Central Vermont R. Co., (1895) 159 U. S. 630.
Eustis v. Bolles, (1893) 150 U. S. 631.
Delaware City, etc., Steamboat Nav. Co. v. Reybold, (1892) 142 U. S. 636.
Tyler v. Cass County, (1892) 142 U. S. 288.
Hammond v. Johnston, (1891) 142 U. S. 73.
New Orleans v. New Orleans Water Works Co., (1891) 142 U. S. 79.

Walter A. Wood Mowing, etc., Mach. Co. v. Skinner, (1891) 139 U. S. 293.
Beaupre v. Noyes, (1891) 138 U. S. 397.
Beatty v. Benton (1890) 135 U. S. 244.
Marrow v. Brinkley, (1889) 129 U. S. 178.
San Francisco v. Itsell, (1890) 133 U. S. 65.
Hopkins v. McLure, (1890) 133 U. S. 380.
Hale v. Akers, (1889) 132 U. S. 554.
Jenkins v. Loewenthal, (1884) 110 U. S. 222.
Murdock v. Memphis, (1874) 20 Wall. (U. S.) 590.
Klinger v. Missouri, (1871) 13 Wall. (U. S.) 263.

Considering the fact that appellant has two years in which to sue out the writ the question becomes of great practical importance.

We are satisfied beyond doubt that the decision of this court as rendered is correct and cannot be reversed, but resting, as it does, solely on a federal question (assuming such to be the case) it necessarily follows that respondent's title must necessarily remain inchoate and incomplete until the Federal Supreme Court has passed upon the matter, or time for suing out a writ therefrom has expired, whereas if in consideration of the question of estoppel this court holds that it is also sufficient to support the judgment, we shall consider the litigation at an end, for estoppel is not a federal
367 question.

For these reasons we respectfully urge that this court pass upon and directly decide the question of estoppel.

Respectfully submitted,

SULLIVAN & SULLIVAN,
FRANK REEVES,
*Attorneys for Respondent.*

[Endorsed:] No. —. In the Supreme Court of the State of Idaho. Charles Swanson, Appellant, vs. Nancy M. Kettler et al., Respondents. Respondent's Petition for Rehearing on Estoppel. Filed this 17 day of Dec., 1909. I. W. Hart, Clerk. Sullivan & Sullivan, Reeves & Reeves, Wenatchee, Wash., Attorneys for R.

368 Filed Jan. 4, 1910. I. W. Hart, Clerk.

November Term, 1909.

SWANSON, Appellant,
vs.
KETTLER et al., Respondent-.

On Petition for Re-Hearing.

AILSHIE, *J.:*

A petition has been filed in this case by the respondents asking for a re-hearing on the single question of estoppel. The contention made for re-hearing is that the court decided the case on a purely

federal question, and that the decision of this court is therefore reviewable by the supreme court of the United States; that the question of estoppel is not a federal question and that if the contention made on this point should be decided in favor of respondents such decision would render the judgment of this court final and not reviewable by the supreme court of the United States. This latter proposition seems to be correct and supported by the decisions from the supreme court of the United States and was given due consideration by us before announcing our decision in the case. (See Cal. Powder Wks. v. Davis, 151 U. S. 389; Rutland R. Co. v. Cen. Vt. R. Co., 159 U. S. 630; Capt. Natl. Bank v. Cadiz First Natl. Bank, 172 U. S. 425.) It has been the uniform practice of this court to only decide such questions as were necessary to a final judgment in any given case. The question we have decided in this case finally disposes of the case and makes the consideration of other questions unnecessary. If we had thought that the supreme court of the United States was likely to disagree with us or reverse our judgment, we would not have held as we did, but, on the contrary, would have followed what we conceived to be the rule of law recognized and adopted by that court. If it should so happen that the decision of this court is reversed, it will then be time enough to consider any further questions raised. The petition is denied.

369 The appellant has also filed a petition "for a re-hearing and a re-consideration of the case, and particularly with reference to the question as to whether there is sufficient evidence to justify the trial court's finding as to the Malta No. 1 and the Emma No. 2 covering the same ground." We did not review the evidence on this question in the original opinion. In considering this question the court did say, "it could serve no good purpose in this case to set out in this opinion the evidence showing that the discovery of Independent No. 2 was upon Emma No. 2, and that the lines of the Malta No. 1 and Emma No. 2 were identical, but we find sufficient evidence in the record to support the findings of the court." It is true that the evidence is conflicting on this issue and is indeed unsatisfactory, and if it were an original proposition before this court we might find differently from the finding of the trial court, but under the uniform rule of this court, as well as the command of the statute (Sec. 4824 R. C.), we are impelled to sustain the finding of the trial court. There is a substantial conflict in the evidence and the trial court felt justified in believing the evidence to the effect that the Malta No. 1 and the Emma No. 2 covered the same ground and were identical. He evidently did not believe the evidence to the contrary. The petition will therefore be denied.

Stewart, J., concurs.

370 In the Supreme Court of the State of Idaho.

CHARLES SWANSON, Appellant,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Respondents.

*Petition for Writ of Error.*

To the Supreme Court of the State of Idaho:

Your petitioner, Charles Swanson, the above named appellant, alleges and shows unto the Court that on the 30th day of November A. D., 1909, judgment in this court was made and entered in favor of said respondents and against said appellant, whereby it was ordered and adjudged that the judgment and decree in the District Court of the Fourth Judicial District of the State of Idaho, in favor of said respondents, defendants therein, and against said appellant, plaintiff therein, be affirmed with costs, and thereafter a petition of said appellant for a rehearing was filed, presented and considered in said court, and on the 4th day of January A. D., 1910, was by said Supreme Court of the State of Idaho overruled and denied.

That said Supreme Court of the State of Idaho is the highest court of said State in which a decision in this action could be had.

Your petitioner further alleges that this is an action
371 brought by said Charles Swanson against said John T. Sears and Nancy M. Kettler under the statutes of the United States in order to determine the right and ownership of a certain area of mining ground in conflict between the Malta No. 1 lode mining claim of said John T. Sears and Nancy M. Kettler, for which they had applied in the United States Land Office for a patent, and the Independence No. 2 lode mining claim of said Charles Swanson, who had theretofore protested the granting of said patent, and said controversy related wholly to the mineral lands of the United States and the patenting of the same, said lands being situated in Warm Springs Mining District, in the County of Blaine, State of Idaho.

That in said action said Charles Swanson claimed the right and title to said Independence No. 2 lode mining claim, by virtue of his location thereof prior to the location of the said Malta No. 1 of said defendants and respondents, and said defendants and respondents claimed that said Independence No. 2 lode mining claim was invalid for the reason that the said conflict area containing the discovery of the said Independence No. 2 at the time of the location of the said Independence No. 2 was contained within the limits of the Emma No. 2, a then valid and subsisting mining claim, which,

having been abandoned by the locators thereof after the
372 location of the Independence No. 2 was thereupon re-located by the said defendants and respondents, and that said conflict area did not enure to the Independence No. 2 as claimed by the said appellant.

That in the said action the rights of the respective parties depended upon the construction of the statutes of the United States and the said appellant claimed his right and title to said Independence No. 2 by reason of the construction of said statutes of the United States, and the said defendants and respondents claimed that the said construction of said statutes contended for by said appellant was incorrect, and the decision of the said Supreme Court of the State of Idaho was against the said title of the said appellant, claimed under said statutes, and against the construction of said statutes, claimed by said appellant, and said Supreme Court of the State of Idaho adopted the contrary construction of said statutes, and based its decision thereon, all of which will appear from the judgment and record of the said Supreme Court of the State of Idaho herein.

That said Charles Swanson alleges that he has been aggrieved by the said judgment in that in said judgment certain errors were committed by the said Supreme Court of the State of Idaho in its construction of the said statutes of the United States, as will more fully appear from the assignment of errors, filed herewith.

373 Wherefore, the said Charles Swanson, appellant above named, prays that a writ of error may issue out of the Supreme Court of the United States to the said Supreme Court of the State of Idaho, wherein the said Charles Swanson shall be plaintiff in error and said John T. Sears and Nancy M. Kettler shall be defendants in error for the correcting of the errors complained of and that a duly authenticated transcript of the record proceedings and papers herein may be transmitted to the said Supreme Court of the United States.

JOHN M. ZANE,
ARTHUR M. BOWEN,
*Attorneys for Charles Swanson.*

373½ [Endorsed:] Original. In the Supreme Court of the State of Idaho. Charles Swanson, Appellant, vs. John T. Sears and Nancy M. Kettler, Respondents. Petition for Writ of Error to Supreme Court of the United States. Filed this 26 day of Jan., 1910. I. W. Hart, Clerk.

374 In the Supreme Court of the United States.

CHARLES SWANSON, Plaintiff in Error,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Defendants in Error.

*Assignment of Errors.*

Comes now the plaintiff in error in the above entitled cause and shows that in the record and proceedings in said cause, The Supreme Court of the State of Idaho erred to the grievous wrong of and against the rights of the plaintiff in error in the following particulars, to-wit:

1. The said Supreme Court erred in holding that the Emma No. 2 mining claim was at the date of the location of the Independence No. 2 mining claim, a valid and subsisting claim.

2. The said Supreme Court erred in holding that annual assessment work done upon a particular claim for the purpose of representing several claims, if sufficient for one claim but not sufficient to represent all the claims it was done for, should be applied to the claim the work was done upon and be held as done for that particular claim.

3. The said Supreme Court erred in holding that the assessment work for the Emma No. 2 mining claim was done in the year 1888.

375 4. The said Supreme Court erred in holding that the Independence No. 2 mining claim was not located upon unoccupied mineral land of the United States.

5. The said Supreme Court erred in holding that the Independence No. 2 mining claim was not a valid mining claim at the time of its location because it covered an area in conflict with the Emma No. 2 mining claim, a then subsisting claim.

6. The said Supreme Court erred in holding that upon the abandonment and forfeiture of the Emma No. 2 mining claim, the Independence No. 2 mining claim did not therefore become a valid and subsisting claim for its whole area, including the area theretofore in conflict between the said Emma No. 2 and the said Independence No. 2.

7. The said Supreme Court erred in holding that the Malta No. 1 mining claim, located after the Independence No. 2 mining claim, was superior in right and title to the said Independence No. 2 mining claim.

8. The said Supreme Court erred in holding that the Malta No. 1 mining claim, located after the abandonment and forfeiture of the Emma No. 2 mining claim, and upon ground then partly covered by the Independence No. 2, mining claim, a valid and subsisting claim, was superior in right to the said Independence No. 2 mining claim, as to said conflict-area.

9. The said Supreme Court erred in holding that as between two locators contesting in an adverse suit under sec. 2326, Rev. Stat., the junior of such locators can show to invalidate the location of the senior of such locators, that at the time such senior locator

376 made his location, there was a subsisting older location covering part of the ground located by the senior of such locators, although at the time such junior of such two locators located his junior claim, such subsisting older claim had become abandoned and forfeited.

10. The said Supreme Court erred in rendering its judgment affirming the decree of the District Court for the Fourth Judicial District of the State of Idaho.

11. The said Supreme Court erred in not holding that the plaintiff in error had the right to lay the lines of his Independence No. 2 mining claim partly across the Emma No. 2, when his entry was peaceable.

12. The said Supreme Court erred in not holding that by means

of the location of the Independence No. 2 the said plaintiff in error acquired the right to the Independence No. — mining claim, except as to the portion in conflict between the Independence No. 2 and the Emma No. 2.

13. The said Supreme Court erred in not holding that upon the abandonment and forfeiture of the Emma No. 2, the conflict area between the Emma No. 2 and the Independence No. 2 inured to the benefit of the Independence No. 2.

14. The said Supreme Court erred in not holding that the Malta No. 1, being a relocation of the Emma No. 2, made after the forfeiture and abandonment of the Emma No. 2, could not, by reason of its location, gain a right superior to the Independence No. 2, to ground then embraced within the Independence No. 2.

15. The said Supreme Court erred in not holding that in adverse proceedings under sec. 2326, Rev. Stat., a junior locator applying for a patent, which application is adversed as to a certain conflict
377 area by a senior locator, cannot show that the location of such senior location is invalid for the reason that it was partly located upon ground, then covered by an older subsisting mining claim, which older mining claim had become forfeited and abandoned prior to the location of the said junior location, such junior location being not in privity with such older location.

16. The said Supreme Court erred in holding that the Independence No. 2 mining claim, if patent was applied for, could be successfully adversed by the Malta No. 1 mining claim by a showing that the Independence No. 2 was a void location, because at the time of its location it was made partly upon ground not open to location under the mineral laws of the United States, by reason of the fact that the ground of the Independence No. 2 was then partly covered by the Emma No. 2, a location older than the Independence No. 2, but abandoned and forfeited before the location of the Malta No. 1.

17. The said Supreme Court erred in holding that in case of a conflict area as between a senior and junior location, a relocation is necessary by the junior location, upon the forfeiture or abandonment of the senior location, before the junior location can claim the conflict area.

18. The said Supreme Court erred in making and rendering its judgment affirming the said decree of said District Court.

19. The said Supreme Court erred in not making and rendering its judgment reversing said decree of said District Court.

378 Wherefore, the said plaintiff in error for these and other manifest errors appearing in said record, prays that the said judgment of the Supreme Court of the State of Idaho may be reversed, set aside, and held for naught, and that said plaintiff in error may have his costs to be taxed.

(Signed) JOHN M. ZANE,
ARTHUR M. BOWEN,
*Attorneys for said Plaintiff in Error.*

(Endorsed:) Assignment of Errors. Filed this 28th day of Jan., 1910. I. W. Hart, Clerk.

379 In the Supreme Court of the State of Idaho.

CHARLES SWANSON, Appellant,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Respondents.

Comes now Charles Swanson, the appellant above named, on this 26th day of January, A. D. 1910, and files and presents to this Court his petition, praying for the allowance of a writ or error, intended to be urged by him; and upon consideration of the said petition, this Court, desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said Charles Swanson, appellant, give bond according to law in the sum of Twenty Five Hundred ($2500.00) dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this *day of* 26th day of January, A. D., 1910.

(Signed) ISAAC N. SULLIVAN,
*Chief Justice of the Supreme Court of the State of Idaho.*

(Endorsed:) Allowance of Writ of Error. Filed this 28th day of Jan., 1910. I. W. Hart, Clerk.

380 In the Supreme Court of the State of Idaho.

CHARLES SWANSON, Plaintiff in Error,
vs.
JOHN T. SEARS and NANCY M. KETTLER, Defendants in Error.

Know all men by these presents: That we Charles Swanson, of the County of Blaine, State of Idaho, as principal, and Fidelity and Deposit Company of Maryland, of Baltimore, Md., as surety, are held and firmly bound unto the above named John T. Sears and Nancy M. Kettler, in the sum of Two Thousand Five Hundred ($2500.00) Dollars, to be paid to them, and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of January, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above named Charles Swanson, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho.

381 Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect and answer all costs and damages that may be

adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

(Signed) CHARLES SWANSON. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By HARRY C. WYMAN,
*Its Attorney in Fact.*

[SEAL.] Attested and Sealed
By SIDNEY C. FULD,
*General Agent.*

This bond approved this 7th day of February, A. D. 1910.
(Signed) ISAAC N. SULLIVAN,
*Chief Justice of the Supreme Court of the State of Idaho.*

(Endorsed:) Bond. Filed Feb. 7, 1910. I. W. Hart, Clerk.

382 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John T. Sears and Nancy M. Kettler, Idaho, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Idaho, wherein Charles Swanson is plaintiff in error, and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of the State of Idaho, this 26th day of January, 1910.

[Seal of Supreme Court, State of Idaho.]

ISAAC N. SULLIVAN,
*Chief Justice of the Supreme Court of the State of Idaho.*

Attest:
I. W. HART,
*Clerk of the Supreme Court of the State of Idaho.*

COUNTY OF BLAINE,
*State of Idaho, ss:*

We, the undersigned, attorneys of record for the defendants in error of the above entitled cause, hereby acknowledge due service of the above citation, this 28th day of January, 1910, and enter an appearance for said defendants in error in the Supreme Court of the United States.

FRANK REEVES,
SULLIVAN & SULLIVAN,
By W. E. SULLIVAN,
*Attorneys for Defendants in Error.*

383 *Certificate of Lodgment*

SUPREME COURT,
*State of Idaho, ss:*

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that there was lodged with me as such clerk on January 29, 1910, in the matter of Charles Swanson, plaintiff in error, vs. John T. Sears and Nancy M. Kettler, defendants in error, writ of error as herein set forth; and on February 7, 1910, the original bond of which a copy is herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Boise, Idaho, this 15th day of February, 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
*Clerk Supreme Court of Idaho.*

383½ [Endorsed:] Original. In the Supreme Court of the State of Idaho. Charles Swanson, Appellant, vs. John T. Sears and Nancy M. Kettler, Respondent. Citation. Filed this 28th day of Jan. 1910. I. W. Hart, Clerk.

384 *Return to Writ.*

UNITED STATES OF AMERICA,
*Supreme Court of Idaho, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Boise, this February 15th, 1910.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
*Clerk of the Supreme Court of the State of Idaho.*

*Costs of Suit.*

Plaintiff's Costs, $20.00, paid by Charles Swanson.

Defendants' Costs, $4.65, paid by John T. Sears and Nancy M. Kettler.

Costs of transcript, $91.65, paid by Charles Swanson.

I. W. HART,
*Clerk Supreme Court of Idaho.*

Endorsed on cover: File No. 22,040. Idaho Supreme Court. Term No. 217. Charles Swanson, plaintiff in error, vs. John T. Sears and Nancy M. Kettler. Filed February 24th, 1910. File No. 22,040.

Clerk.

FEB 23 1912

JAMES H. McKENNEY,

# Supreme Court of the United States.

OCTOBER TERM, 1911.

## No. 217

CHARLES SWANSON,
*Plaintiff in Error,*
vs.
JOHN T. SEARS AND NANCY M. KETTLER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

## BRIEF OF PLAINTIFF IN ERROR.

JOHN M. ZANE,
*Attorney for Plaintiff in Error.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1911.

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## No. 217

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CHARLES SWANSON,
*Plaintiff in Error,*
*vs.*
JOHN T. SEARS AND NANCY M. KETTLER.

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## BRIEF OF PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

(In the following statement references made to the record are to the top paging of the printed record.)

This cause involves a single federal question upon the proper construction of the Federal Statutes in regard to mining claims.

The Supreme Court of Idaho decided but a single Federal question as controlling the case (Rec., 167-178), and expressly refused on the petition for rehearing of the defendants in error to decide any

other question (Rec., 190, 191), although the court was requested by defendants in error so to do, for the openly asserted purpose of ousting the jurisdiction of this court upon a writ of error (Rec., 187-190).

The Federal question presented grows out of the following facts stated upon the record in the findings of the District Court for the Fourth Judicial District of Idaho in and for Blaine County, confirmed by the Supreme Court of Idaho, in a protest suit involving the validity of the Independence No. 2 mining claim against the Malta No. 1 mining claim.

On May 21, 1881, John Sears, one of the defendants in error, and S. M. Tucker entered upon the public mineral lands of the United States and duly located the Emma No. 2 Lode mining claim in Warm Springs Mining District, Blaine County, Idaho (Rec., 117), and prior to the year 1902 an interest in said mining claim duly passed to the defendant in error Nancy M. Kettler, then Nancy M. Tucker (Rec., 18). The Emma No. 2 was a north and south claim as stated by the Supreme Court of Idaho.

Assessment work upon said Emma No. 2 claim was duly performed for each and every year after location until and including the year 1902. (Rec., 18.)

On January 3, 1889, the predecessors in interest of plaintiff in error properly located the Independence No. 2 Lode mining claim by actual discovery, substantial marking upon the ground and posting of notice of location (Rec., 18), but said location em-

braced a strip of land 600 feet x 600 feet of the Emma No. 2 which would be the west 600 feet of said Independence No. 2 and the discovery point of said Independence No. 2 was in said conflict area and within the limits of said Emma No. 2; then a valid and subsisting claim. (Rec., 19.) Up to the beginning of the suit, the assessment work on said Independence No. 2 was duly performed. (Rec., 20.) The Independence No. 2 was an east and west claim as stated by the Supreme Court of Idaho.

During the year 1903, the assessment work on said Emma No. 2 was not performed (Rec., 20), and said claim thereby became forfeited. On January 1, 1904, said Nancy M. Kettler caused the land that had been embraced in said Emma No. 2 to be *relocated* as the Malta No. 1 Lode mining claim, intending to make it a "relocation" of the Emma No. 2 and did the acts required to make the same a complete relocation (Rec., 22, 23), in regard to posting, marking and discovery. The boundaries of Emma No. 2 and Malta No. 1 were the same.

The location of the Malta No. 1 was made by A. J. Sullivan in the interest of Nancy M. Kettler and prior to the commencement of this suit said Sullivan conveyed said Malta No. 1 to said Nancy M. Kettler and a one-half interest in said Malta No. 1 to said Sears and thereafter, and prior to the commencement of this suit, said Sears conveyed his interest in said Malta No. 1 to said Nancy M. Kettler who became thereby the sole owner of said Malta No. 1. (Rec., 23, 24.)

Thereafter on or about January 10, 1908, as ad-

mitted by the pleadings, the defendants in error applied in the United States Land Office at Hailey, Idaho, for a patent for the said Malta No. 1 (Rec., 5, 9), including said conflict area and during the sixty days' period of publication thereof, the plaintiff in error filed his protest and adverse claim in said land office. (Rec., 5, 9.)

This suit was a protest suit against the granting of said patent for said Malta No. 1. The pleadings involved the question whether, as to the said conflict area, the Independence No. 2 of the plaintiff in error or the Malta No. 1 of the defendants in error, had the better right.

In the opinion of the Supreme Court the question to be decided and the only question decided by it, after its ascertainment of the facts, is stated as follows:

> "The real and important question in this case, then, arises out of the following facts as found by the trial court: Emma No. 2 mining claim was located in the year 1881 as a north and south location, and the annual assessment work was performed up to the close of the year 1903. The Independence No. 2 mining claim was located as an east and west location on January 3, 1889, the discovery point of which was within the limits of the Emma No. 2. The assessment work was not performed on Emma No. 2 for the year 1903. On January 1, 1904, the Malta No. 1 mining claim was located upon the lines of the Emma No. 2 and embraced the identical ground covered by the Emma No. 2. Under these facts, in whom does the title and right of possession to the ground in conflict between the Independence No. 2 and Malta No. 1 rest, with the appellant (Swanson) as the

owner of the Independence No. 2 or with the respondent (Kettler) as owner of Malta No. 1?" (Rec., 171, 172.)

The Supreme Court of Idaho held that the conflict area belonged to defendant in error, Kettler, as a part of the Malta No. 1.

This protest suit in the lower court was brought under the provisions of Sections 2325 and 2326 of the Revised Statutes of the United States, governing contests for patent.

Sec. 2325, *supra*, which it is not necessary to quote *verbatim* provides for the filing in the proper land office of the United States of an application for a patent for mineral land and for a publication of such application for sixty days and then proceeds:

> "If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent * * *."

Sec. 2326, *supra*, provides:

> "Where an adverse claim is filed during the period of publication * * * all proceedings * * * shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

The record in the District Court of Idaho which

tried the case shows that the protest and adverse claim of plaintiff in error were filed in the land office in due time and were in due form. (Rec., 148, 149.)

The question involved in the case arises under the preceding sections and the following sections of the Revised Statutes of the United States.

Section 2319 of the Revised Statutes provides that:

> "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Sec. 2320 of the Revised Statutes prescribes the amount of surface ground that may be located, with the further provision:

> "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Sec. 2322 of the Revised Statutes defines the locator's rights of possession and enjoyment, as including the surface ground and all veins apexing in the claims and defined the extra lateral right within the parallel end line planes.

Sec. 2324 of the Revised Statutes provides:

> "The location must be distinctly marked on the ground so that its boundaries can be readily

traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100.00 worth of labor shall be performed or improvements made during each year * * * but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location."

ASSIGNMENT OF ERRORS.

6. The said Supreme Court erred in holding that upon the abandonment and forfeiture of the Emma No. 2 mining claim, the Independence No. 2 mining claim did not therefore become a valid and subsisting claim for its whole area, including the area theretofore in conflict between the said Emma No. 2 and the said Independence No. 2.

7. The said Supreme Court erred in holding that the Malta No. 1 mining claim, located after the Independence No. 2 mining claim, was superior in right and title to the said Independence No. 2 mining claim.

8. The said Supreme Court erred in holding that the Malta No. 1 mining claim, located after the abandonment and forfeiture of the Emma No. 2 mining claim, and upon ground then partly covered by the Independence No. 2 mining claim, a valid and subsisting claim, was

superior in right to the said Independence No. 2 mining claim, as to said conflict area.

9. The said Supreme Court erred in holding that as between two locators contesting in an adverse suit under Sec. 2326, Rev. Stat., the junior of such locators can show to invalidate the location of the senior of such locators, that at the time such senior locator made his location, there was a subsisting older location covering part of the ground located by the senior of such locators, although at the time such junior of such two locators located his junior claim, such subsisting older claims had become abandoned and forfeited.

10. The said Supreme Court erred in rendering its judgment affirming the decree of the District Court for the Fourth Judicial District of the State of Idaho.

11. The said Supreme Court erred in not holding that the plaintiff in error had the right to lay the lines of his Independence No. 2 mining claim partly across the Emma No. 2, when his entry was peaceable.

13. The said Supreme Court erred in not holding that upon the abandonment and forfeiture of the Emma No. 2 the conflict area between the Emma No. 2 and the Independence No. 2 inured to the benefit of the Independence No. 2.

14. The said Supreme Court erred in not holding that the Malta No. 1, being a relocation of the Emma No. 2, made after the forfeiture and abandonment of the Emma No. 2, could not by reason of its location, gain a right superior to the Independence No. 2, to ground then embraced within the Independence No. 2.

15. The said Supreme Court erred in not holding that in adverse proceedings under Sec. 2326, Rev. Stat., a junior locator applying for a patent, which application is adversed as to a certain conflict area by a senior locator, cannot show that the location of such senior lo-

cator is invalid for the reason that it was partly located upon ground, then covered by an older subsisting mining claim, which older mining claim had become forfeited and abandoned prior to the location of the said junior location, such junior location being not in privity with such older location.

16. The said Supreme Court erred in holding that the Independence No. 2 mining claim, if patent was applied for, could be successfully adversed by the Malta No. 1 mining claim by a showing that the Independence No. 2 was a void location, because at the time of its location it was made partly upon ground not open to location under the mineral laws of the United States, by reason of the fact that the ground of the Independence No. 2 was then partly covered by the Emma No. 2, a location older than the Independence No. 2, but abandoned and forfeited before the location of the Malta No. 1.

17. The said Supreme Court erred in holding that in case of a conflict area as between a senior and junior location, a relocation is necessary by the junior locator, upon the forfeiture or abandonment of the senior location, before the junior location can claim the conflict area.

19. The said Supreme Court erred in not making and rendering its judgment reversing said decree of said District Court. (Rec., 194, 195.)

The prayer is for a reversal of the judgment of the Supreme Court of Idaho and for costs.

## ABSTRACT OF ARGUMENT.

The question to be decided is: In a case where A duly locates claim X and thereafter, while X is a subsisting claim, B duly locates another claim Y, whose surface conflicts with claim X and B continues to keep his claim alive by performance of statutory labor until and after such time as A allows claim X to become forfeited and after such forfeiture and while claim Y is being kept good, A relocates the ground covered by claim X as claim Z, does the conflict area between claim X and claim Y, upon the forfeiture of claim X, belong to claim Y or does it become unoccupied public mineral land of the United States, B not having relocated or again located or amended the location of, claim Y upon the forfeiture of claim X.

The question is, first, nothing more than whether B must relocate his claim Y, upon the forfeiture of X; if he does relocate, it is conceded by the Supreme Court of Idaho in its opinion in this case (Rec., 176) that he gains the conflict area.

The question is, second, whether A can relocate his claim X upon its forfeiture in order to escape the assessment work.

The first question is to be decided in the light of the following settled rules:

A location requires three things, 1, discovery of the vein; 2, proper location notice; 3, marking upon the ground. A claim is not complete until discovery, but the order in which the acts are performed is

immaterial, provided the three things concur in the claim before it is insisted upon as a mining claim duly located.

*Mining Co.* v. *Tunnel Co.*, 196 U. S., 337.

In claim Y in the case supposed above, upon the forfeiture of claim X the three things of discovery, marking and proper location notice concurred before claim Z was located; *i. e.*, they concurred at the moment when claim X ceased to exist.

If claim Y upon the forfeiture of claim X became a good location including the area theretofore in conflict with X, and was good as against the United States, it was good as against a relocator of claim X, who comes in under the government title and who gets no more title than the government then had to give him.

There was no objection to locator B laying the lines of his claim Y across the surface of claim X provided his entry was peaceable and upon his doing so, he obtains all of the vein that his marked claim gives him, except what is taken by claim X, and if X ceases to exist, claim Y gets all that claim X theretofore had.

*Del Monte M. Co.* v. *Last Chance M. Co.*, 171 U. S., 55.

This conclusion that the conflict enures to the junior claim upon forfeiture of the senior claim also results from a consideration of the statute as to adverse claim and protest suit, for if the owner of the X claim waives his rights or fails to set them

up or fails to prosecute an adverse claim, the conflict area is patented to B in his claim Y.

*Lavagnino* v. *Uhlig*, 198 U. S., 443.
*Gwillim* v. *Donellan*, 115 U. S., 45.
*Mining Co.* v. *Tunnel Co., supra.*

Every evil urged by the courts of Nevada and Utah as resulting from the allowing of the conflict area to enure to claim Y upon the forfeiture of claim X, if there are any such evils, has already been permitted by the rule in *Del Monte M. Co.* v. *Last Chance M. Co., supra,* and by the constant practice of the land department, which allows such enuring.

*Mutual M. Co.* v. *Currency Co.*, 27 Land. Dec., 191.
*Gowdy* v. *Kismet M. Co.*, 22 Land Dec., 624.
*American Consol. M. Co.* v. *DeWitt*, 26 Land Dec., 580.
*Burnside* v. *O'Connor*, 30 Land Dec., 67.

The statute must be given a reasonable interpretation in the light of the well known fact that one claim is frequently laid over another claim. If no evil can result from this practice sufficient to call for its abolition, no evil can result from its application in protest suits as well as in questions relating to apex rights on the vein.

The fact that the conflict area contains the discovery of claim Y is immaterial and is so treated in the cases of

*Lavagnino* v. *Uhlig, supra.*
*Swanson* v. *Kettler*, 17 Idaho, 321 (Rec., 168).

If B, after locating his claim Y, had made another discovery outside the conflict area, his whole claim would have become good without relocation, even in Utah, upon the forfeiture of claim X.

*Silver City M. Co.* v. *Lowry,* 19 Utah, 334.
*Bingham Amal. Co.* v. *Ute Co.,* 181 Fed. Rep., 748.
*Gwillim* v. *Donellan,* 115 U. S., 45.

This record is insufficient to support the judgment for it fails to show that there was no discovery in Y outside the conflict area before claim Z was made as a relocation.

If the third claim Z, the relocation of claim X, is eliminated from the discussion, there is no question but that claim Y, upon the forfeiture of X is a valid claim against the United States and must be therefore against its grantee.

See authorities collected in *Costigan Mining Law,* 153, note 25; 160, note 51, and *Mining Co.* v. *Tunnel Co., supra.*

Similarly, if the third claim Z is eliminated from the discussion, even if claim Y had no discovery at all, it would have become good upon a discovery within its limits without any relocation, for everything except the area conflicting with the older claim, and upon that claim being forfeited, claim Y would have had its whole surface. So much is admitted by all the authorities.

The decision in *Lavagnino* v. *Uhlig, supra,* was correct when it decided that the relocator of X as against claim Y could not show that his conflict

area with an older claim Y, was itself in a still older claim X, when the location of Y was made, but which afterwards became forfeited, and the court should upon fuller consideration affirm that case.

That case agrees with all the analogies of the mining law; it does not create but avoids an irreconcilable conflict with *Del Monte M. Co.* v. *Last Chance M. Co., supra,* and with *Mining Co.* v. *Tunnel Co., supra,* and the Land Office practice; it is not contrary to *Belk* v. *Meagher,* 104 U. S., 279.

It agrees with the rule that if the owner of the older claim X had drawn in his line so as not to conflict with claim Y, Y would have at once become good without relocation even if the discovery of Y was within the conflict area.

*Tonopah & S. M. Co.* v. *Tonopah M. Co.,*
125 Fed. Rep., 408.

The whole difficulty on the point under consideration results from a misapplication of the language of the Court in *Belk* v. *Meagher,* 104 U. S., 279.

The word "relocation" is properly applied to an actual relocation where a junior locator enters to appropriate the work, the boundaries, the marking and the discovery of a prior locator. Such an entry must be wrongful and unlawful and cannot be innocent when such senior claim is still subsisting. In such case it is proper to hold that a relocation is void unless the senior claim, which is being relocated, has passed away. Such is the situation described in *Belk* v. *Meagher, supra,* and *Brown* v. *Gurney,* 201 U. S., 184.

But the word "relocation" is improperly applied

to a junior location which merely conflicts with a senior location but is made upon a different discovery, different location and different markings. The latter kind of double location for a part of a claim often arises and is properly and laudably made as in *Del Monte M. Co.* v. *Last Chance M. Co., supra.*

In *Farrell* v. *Lockhart*, 210 U. S., 142, guarded language is used, which simply qualifies *Lavagnino* v. *Uhlig*, so that it will not apply to a relocation pure and simple; the qualification is not intended to render doubtful its application to a mere conflict in locations, where the junior locator was not attempting to appropriate the senior locator's discovery, location boundaries and work.

*Brown* v. *Gurney, supra*, does not contradict the rule which we contend for (1) because it was a relocation pure and simple and therefore belongs to the class of *Belk* v. *Meagher* and (2) the ground was *sub judice* and motives of policy would require it for the time being to be non-locatable.

All the evils foretold from the rule in *Lavagnino* v. *Uhlig* are wholly fanciful.

Costigan, "*The Doctrine of Farrell* v. *Lockhart*," 11 Columbia Law Rev., 733, 738. In that article this whole question is examined by the author of the latest and most exhaustive work on Mining Law and the doctrine of *Lavagnino* v. *Uhlig* is shown to be unexceptionable.

See also Costigan Mining Law, 313, note 60.

The second question as to the relocation by defendant in error Kettler of her own claim, being

void as an evasion of the statutory labor statute, is answered by the authorities to the effect that such a relocation is void.

1 Lindley on Mines (2d Ed.), Sec. 405.
Shamel on Mining Law, 128, 129.
Morrison's Mining Rights (13th Ed.), 124, 125.
Costigan Mining Law, 327-330.

No useful purpose could be subserved by holding that a locator when a conflict with a senior location passes away must enter upon his own claim, go through the useless form of writing again his location notice, of adopting his own discovery point and adopting the boundaries and markings he had himself made. The record already made of his claim tells every fact that such a useless republication of his claim would give. Such acts, however, are proper for an actual relocation and appropriation of another's work, between which and the former existing location no privity exists, as pointed out in *Lavagnino* v. *Uhlig, supra.*

## BRIEF OF ARGUMENT.

The exact question to be decided, stated in its concrete form, is as follows:

A (defendant in error) duly locates a mining claim called X (Emma No. 2) and thereafter while claim X is a valid, subsisting claim, B (plaintiff in error) duly locates another claim, Y (Independence No. 2), whose surface conflicts with that of claim X. B continues in the performance of assessment work to maintain claim Y as a valid and subsisting claim and while he is so performing the assessment work on claim Y, A allows his claim X to become forfeited for want of assessment work and after such forfeiture A relocates the ground covered by his original claim X as claim Z (Malta No. 1). Does the conflict area between claims Y and Z, which is, of course, the same conflict area as that in conflict between claims Y and X, belong to B without a relocation by B of his claim Y upon the forfeiture of claim X, or does the conflict area belong to A by reason of his relocation of the claim X as claim Z?

When the question is thus stated, it becomes apparent, as pointed out in the case of *Lavagnino* v. *Uhlig*, 198 U. S., 443, that the sole material inquiry is whether B must relocate his claim Y when the X claim ceases to exist and before A relocates the X claim as claim Z; or in other words are B's rights the same whether with or without such relocation of his Y claim? All the authorities are agreed that if upon the forfeiture of claim X, B relocates his

claim Y, his claim becomes a good and valid claim. The Supreme Court of Idaho has expressly so held in this case:

> "The owners of the Independence No. 2 might have made such territory (conflict area) a part of Independence No. 2 by filing an additional or amended location certificate as prescribed by law, or making an entirely new location covering such territory." (Rec., 176.)

The question for solution is not precisely the same as it is when the third claim in order of time supposed above is located by a different locator than the one who owned the original X claim. The question proposed in this case involves not only the ownership of the conflict area between the claims Y and Z, but it also involves the particular question whether a locator can allow his claim to become forfeited for failure to do the assessment work required by the law and then proceed to relocate such claim as a new claim, the inquiry being whether such a transaction is not a fraud upon the mining law, since a locator could thus keep a mining claim alive without doing any assessment work whatever and thus defeat the law. But we will first consider the question involved in the case as if it were immaterial whether the third locator claiming against the second locator is the same as, or a different person from, the one who located the first and forfeited claim.

The question the court is asked to decide was once decided by this court in the case of *Lavagnino* v. *Uhlig,* 198 U. S., 443. Afterwards a decision was made in the case of *Farrell* v. *Lockhart,* 210 U. S., 142, and in that case the Supreme Court of the United States announced as a *dictum* that the rule

stated in *Lavagnino* v. *Uhlig* would be modified. We purpose to argue that upon fuller consideration *Lavagnino* v. *Uhlig, supra,* ought to be upheld and to show that it is upheld, when applied to the situation we are considering.

The point raised depends for its solution upon a consideration of and proper application of certain rules that have been laid down by this court in regard to mining claims and a proper application and consideration of the effect of the provisions quoted above of the protest suit statute.

The first provision of the statute with which we are immediately concerned is the clause in Section 2320 of the Revised Statutes:

> "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

This clause in connection with the next provision to be noticed has been construed as meaning that no location shall be considered completed until the discovery of the vein or lode within the limits of the claim.

The above provision with those found in section 2324 requires for a location three things: 1. The discovery of a vein within the limits of the claim; 2, the making and posting of a proper location notice; 3, the marking of the claim upon the ground. But it is immaterial in what order these several acts are performed, provided the three things concur in favor of the locator at any time before the rights of third parties have accrued. They mutually assist each other, although the location is not complete until the discovery is made.

*Mining Co.* v. *Tunnel Co.,* 196 U. S., 337.

The next provision in section 2324 requires not less than one hundred dollars' worth of work to be performed or of improvements to be made during each year; "and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to *relocation* in the same manner as if no location of the same had ever been made," provided the locator or his successors have not resumed work.

Now much of the difficulty that has arisen in regard to the question before the court has arisen from the twofold sense in which the word "relocation" has been used when applied to double locations. One species of relocation is the one commonly considered and called a relocation, where a second locator comes upon a mining claim and practically adopts the claim that had been already located, with substantially the same boundaries, discovery point and markings upon the ground and actually in many instances calls his second claim a relocation. This is a relocation pure and simple, the sort of relocation which is considered in a cause that has produced almost endless trouble and confusion.

*Belk* v. *Meagher,* 104 U. S., 279.

But there is another kind of double location that is essentially different from the foregoing, where a second locator throws some of his lines or even puts some of his corners upon or across another existing location, so as to create what is called a conflict area. Instances of this kind of conflict are noticed in *Del Monte M. Co.* v. *Last Chance M. Co.,* 171 U. S., 55.

In the first species of relocation it is apparent that the second locator is after the same claim or mine that already exists, while in the second case it is no less apparent that the second locator is after a wholly different claim than the one already located. Sometimes this second species of conflicting location is called a relocation, but it is an inaccurate use of language and should be discouraged.

We may instance, in explanation of this difference, the rule that a relocation admits the validity of the prior location.

*Zerres* v. *Vanino,* 134 Fed., 610, 614, a case showing clearly the difference between an original location and a relocation.

*Wells* v. *Blain,* 4 N. M., 378; 20 Pac. Rep., 798.

*Jackson* v. *Prior Hill M. Co.* (S. Dak.), 104 N. W. Rep., 207.

In these cases *Belk* v. *Meagher* as an actual relocation case is clearly understood, as it is in *Rose* v. *Richmond,* 17 Nev., 57.

In such a case an estoppel may arise where a claim or mine is knowingly attempted to be relocated, whether the relocation is actually called a relocation or not.

*Yosemite M. Co.* v. *Emerson,* 208 U. S., 25.

In such a case the original locator needs to prove nothing as against the relocation, for the burden is upon the second locator to show that the first location has either been abandoned or forfeited without work resumed.

*Providence M. Co.* v. *Burke,* 6 Ariz., 323, 57 Pac. Rep., 641.

But as to the other sort of conflicting claims a totally different rule prevails. If a conflict exists the burden is upon the first locator to show his performance of assessment work, the statutory condition of his tenure. While it may be true as held in *Belk* v. *Meagher, supra*, that a relocation pure and simple of a valid and existing claim is absolutely void as against all the world and must be good when made, it is no less true that a junior location, which conflicts with a valid senior location, is not void as to the conflict area, but gives to the junior locator everything in the conflict area not taken by the senior location.

*Del Monte M. Co.* v. *Last Chance M. Co.*, 171 U. S., 55.

*Bunker Hill M. Co.* v. *Empire State M. Co.*, 109 Fed. Rep., 538.

It is held also in the cases last cited that there is nothing improper in laying a junior location over or upon the lines of a senior subsisting location, if no forcible entry is perpetrated.

Again it is, as we shall demonstrate, practically certain that a locator cannot relocate his own claim to avoid assessment work, while there is no objection whatever to the same locator laying one claim across another and creating a conflict. In fact if two veins cross each other on their strike at approximately right angles, which is not an unusual occurrence, the locator, in no other way probably, can obtain 1500 feet in length upon each vein with extra-lateral rights.

This distinction as to the use of the word reloca-

tion is fundamental, and it is very questionable whether the words in the statute were ever intended to refer to any kind of conflicting location other than a relocation pure and simple. It is not necessary to discuss the meaning of the statute on that point. But if this distinction is kept in mind, it will not be at all difficult to reconcile the cases in this court. We shall show the effect of this distinction later in this brief. It is apparent from the decision of the Supreme Court of Idaho in the present case that it had not the distinction in mind.

The rule just noticed as being that held in *Del Monte M. Co.* v. *Last Chance M. Co.*, 171 U. S., 55, has a decided bearing upon the question under consideration. The reasoning of the court in that case was based upon a consideration of the whole mining statute, including the provisions as to adverse suit and application for patent and the case states so fully the conditions as they are to be met and provided for in a construction of the statute, that we quote from that case at some length, for it is only by considering the circumstances to which and under which a law is to be applied that we can reach a reasonable interpretation of the law.

The court, at page 79 of the report, states the question and the statutes which are applicable in deciding whether the lines of a junior location can be laid across the surface of a single valid location, and then continues:

> "The stress of the argument in favor of a negative answer to this question lies in the contention that by the terms of the statute exclusive possessory rights are granted to the locator. * * * Hence, it is said that affirma-

tively and negatively it is provided that the locator shall have exclusive possession of the surface, and that no one shall have a right to disturb him in such possession. How then, it is asked, can any one have a right to enter upon such location for the purpose of making a second location? If he does so he is a trespasser, and it cannot be presumed that Congress intended that any rights should be created by trespass.

We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in Section 2320 and elsewhere a 'claim' or a 'mining claim.' Indeed, the words 'claim' and 'location' are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other and include the same ground, for then the right of possession becomes a matter of dispute, but no location creates a right superior to any previous valid location. And these possessory rights have always been recognized and disputes concerning them settled in the courts.

It will also be noticed that the locator is not compelled to follow the lines of the Government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys, but whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often

happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discovered desire to take the entire surface and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced vein, as is possible.

Further, Congress has not prescribed how the location shall be made. It has simply provided that it 'must be distinctly marked on the ground so that its boundaries can be readily traced,' leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are not always made by experienced surveyors. Indeed, as a rule it has been and was to be expected that such locations and markings would be made by the miners themselves—men inexperienced in the matter of sur-

veying, and so in the nature of things there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities the posts, stakes or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places posts, stakes or other monuments, although sufficient at first and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a mining camp, and the contiguous territory is prospected and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made, and, indeed in every mining camp where large discoveries have been made locations, in fact, overlap each other again and again. *McEvoy* v. *Hyman*, 25 Fed. Rep., 596, 600. This confusion and conflict is something which must have been expected, foreseen—something which in the nature of things would happen, and the legislation of Congress must be interpreted in the light of such foreseen contingencies.

Still again, while a location is required by the statute to be plainly marked on the surface

of the ground, it is also provided in Section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid or has failed before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location.

Congress has in terms provided for the settlement of disputes and conflicts, for by Section 2325, when a locator makes application for a patent (thus seeking to have a final determination by the Land Department of his title), he is required to make publication and give notice so as to enable any one disputing his claim to the entire ground within his location to know what he is seeking, and any party disputing his right to all or any part of the location may institute adverse proceedings. Then by Section 2326 proceedings are to be commenced in some appropriate court and the decision of that court determines the relative rights of the parties. And the party who by that judgment is shown to be 'entitled to the possession of the claim, or any portion thereof,' may present a certified copy of the judgment roll to the proper land officers and obtain a patent 'for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightfully possess.' And that the claim may be found to belong to different persons and that the right of each to a portion may be adjudicated is

> shown by a subsequent sentence in that same section, which provides that 'if it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim * * * and patents shall issue to the several parties according to their respective rights.' So it distinctly appears that notwithstanding the provision in reference to the rights of the locators to the possession of the surface ground within their locations, it was perceived that locations would overlap, that conflicts would arise, and a method is provided for the adjustment of such disputes. And this, too, it must be borne in mind is a statutory provision for the final determination, and is supplementary to that right to enforce temporary possession, which, in accordance with the rules and regulations of mining districts, has always been recognized."

The main argument that was made against the proposition there being decided by the court rests upon the same cases which are relied upon by the defendants in error in this case.

The language of this court in the case of *Belk* v. *Meagher*, 104 U. S., 279, 284, and the later case of *Gwillim* v. *Donellan*, 115 U. S., 45, creates the objection.

*Belk* v. *Meagher* contains the following statements:

> "Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator but all the world, because the law allows no such thing to be done.
>
> A location to be effectual must be good at the time when made."

And in the second case it was said:

> "If, when one enters on land to make a loca-

tion there is another location in full force which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

The court in *Del Monte M. Co.* v. *Last Chance M Co., supra,* notices those opinions and then examines the practice of the Land Department and says, quoting from the case of *Atherton* v. *Fowler:*

"Undoubtedly there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter section of land may present conflicting claims to the right of preemption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open, unenclosed, and neither party interferes with the actual possession of the other. In such cases, the settlement of the latter of the two may be *bona fide* for many reasons. The first party may not have the qualifications necessary to a preemptor, or he may have preempted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become preemptor, or it may not be known that the settlements are on the same quarter.

The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, unenclosed and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain and where the validity of apparent locations is un-

settled and doubtful. Under those circumstances it is not strange—on the contrary it is something to be expected and as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—*go through the form of making a relocation* simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines."

The case of *Belk* v. *Meagher, supra,* was formerly taken literally to render any location of a mining claim over another mining claim creating a conflict area, absolutely void as to the conflict area, and that is the theory upon which that case is insisted upon in the present inquiry; but that case shows a claim located in 1864 and assessment work recommenced in June, 1875, and a relocation of the claim made in December, 1876, when the first claim

would not have become forfeited until January 1, 1877. The claim that was held void was a *relocation pure and simple.* This sufficiently appears from the language of the court:

> "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up."

It is plain that the court here uses the word "abandon" to include also a statutory forfeiture. And it is also plain that the court in speaking of a case where a relocator comes in as a relocator to adopt the former locator's claim and discovery. If this necessary limitation on the language of the court had been observed, no difficulty would ever have arisen. The case of *Del Monte M. Co.* v. *Last Chance M. Co., supra,* a leading case, has shown that *Belk* v. *Meagher* cannot be applied to a case of mere conflicting areas in mining claims. But as confined to a true relocation the case of *Belk* v. *Meagher* may very well stand with all the other cases, as we shall see. The court in using the language that the location to be effectual must be good at the time it is made, therefore, must be considered to mean that a relocation made as a relocation must be good when made, for that was the sort of claim the court was dealing with.

The second principle which has been laid down by this court, after the fullest consideration, also infringes upon the doctrine of *Belk* v. *Meagher,*

*supra*, if it is to be taken as holding literally that a location to be effectual must be good when made.

In *Mining Co.* v. *Tunnel Co.*, 196 U. S., 337, 348, after much consideration, it was held that where a location is made without a discovery, but before the rights of any third party have intervened a discovery of mineral is found within the limits of the located claim, the order of the performance of the acts of location becomes immaterial.

The court, at page 348 of 196 U. S., first quoted with approval the following language from *Brewster* v. *Shoemaker*, 28 Colo., 176, 180:

> "The order of time in which the several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location; provided only, all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for locators again to locate their claim, and refile their location certificate or file a new one."

The court next proceeds to say that the above "has been the general doctrine," quoting the text writers and Land Office decisions, and the language of Judge Sawyer, surely a master of this branch of the law, in *North Noonday M. Co.* v. *Orient M. Co.*, 1 Fed. Rep., 522, 531:

> "I instruct you further, that if a party should make a location in all respects regular * * * upon a supposed vein before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location, should discover the vein or lode within the limits of

the vein located, before any other party had acquired any rights therein, from the date of his discovery, his claim would be good to the limits of his claim, and the location thereof."

To the same general effect are quoted the words of *Cedar Canyon M. Co.* v. *Yarwood*, 27 Wash., 271, and then the court proceeds to say:

"Bearing in mind that the principal thought is exploration and appropriation of mineral, does it mean anything more than the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location?

This may be looked at in another aspect: Suppose a discovery is not made before the marking on the ground and posting of the notice, but is then made, and it and all other statutory provisions are complied with before the entry, which is an application for the purchase of the ground, of what benefit would it be to the government to require the discoverer to repeat the marking of the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done, which under the law ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or to go a step further, suppose, on an application for a patent, an adverse suit is instituted, and on trial it appeared that the plaintiff in that suit had made a discovery and taken all the steps necessary for a location in statutory order, although not until after the applicant for patent had done everything required by law, would there be any justice in sustaining the adverse suit and awarding the property to the plaintiff therein on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did precede the location?"

It will be seen that in the last section quoted the court is putting our particular case, if Swanson had applied for a patent and defendant in error had been protesting. The above case establishes a proposition which really decides this controversy, namely, that as against the United States a location is valid, if at any time prior to application for patent the locator has the three necessary things concurring in him, and the statutory requirements have been fulfilled, and the Government cannot defeat the patent? How then can a locator, who comes in under the Government, deriving claim from it, assert a better right against another locator, who has at the time of the entry the statutory requirements to a valid location concurring in him? This court in deciding *Lavagnino* v. *Uhlig* must have had in mind its previous language in *Mining Co.* v. *Tunnel Co., supra.*

The points decided in *Mining Co.* v. *Tunnel Co.* and the Del Monte case had been hotly debated. Precisely the same objections were urged against the allowance of the after discovery to validate and the lines of a junior claim to be laid across a senior claim, as are now urged against allowing the conflict area between two existing claims to enure to the junior claim upon the extinguishment of the senior claim. It was said that such a rule would encourage locations for speculative purposes, and cause altercation if not bloodshed on the mineral lands, that it would act to the prejudice of an honest relocator and lead to an evasion of the annual labor requirement, but in spite of those objections this court saw in them no reason for not adopting the

rule laid down with so much persuasive reasoning in *Mining Co.* v. *Tunnel Co.*, 196 U. S., 337, and in *Del Monte M. Co.* v. *Last Chance M. Co.*, 171 U. S., 55.

This was done, too, in the face of a clear conflict in the judicial decisions. In the case of *Upton* v. *Larkin*, 5 Mont., 600, 7 Mont., 449, the Supreme Court of Montana had held, applying literally what it supposed was held in *Belk* v. *Meagher*, *supra*, that if there was no discovery when the claim was located, the claim could not be validated by any subsequent discovery in the claim, without a relocation.

The Supreme Court of Colorado in *Brewster* v. *Shoemaker*, 28 Colo., 176, 180, in a passage quoted with approval in *Mining Co.* v. *Tunnel Co.*, 196 U. S., 337, 348, had refused to follow the doctrine of *Upton* v. *Larkin*, *supra*.

There is a third rule recognized by all the courts and by the Land Office rulings which may be stated as follows: If A duly locates mining claim X, and thereafter while X is a valid and subsisting claim, B duly locates claim Y conflicting with X but not having its discovery in the conflict area, and if B keeps claim Y a subsisting claim until after locator A allows claim X to become abandoned or forfeited, immediately thereupon the conflict area enures to and becomes a part of claim Y without any relocation or new location or amendment of location of claim Y.

This point is decided in *Lavagnino* v. *Uhlig*, 198 U. S., 443, and upon that point that decision has

never been withdrawn or modified as an authority, and even the Supreme Court of Utah in *Lockhart* v. *Farrell*, 31 Utah, 155, 86 Pac. Rep., 1077, admits it to be the case.

The Land Office practice is in accordance with this well settled rule.

*Mutual M. Co.* v. *Currency Co.*, 27 Land. Dec., 191.

*Gowdy* v. *Kismet M. Co.*, 22 Land Dec., 624.

*American Consol. M. Co.* v. *DeWitt*, 26 Land Dec., 580.

*Burnside* v. *O'Connor*, 30 Land Dec., 67.

If now the conflict area not containing the discovery of the junior location enures to the junior location, why should it not do so if it does contain the discovery. In *Lavagnino* v. *Uhlig* the fact of whether the discovery was or was not in the conflict area was treated as immaterial. And likewise in this particular case, *Swanson* v. *Kettler*, 17 Idaho, 321 (opinion printed Rec., 168), the Supreme Court of Idaho considered that point as immaterial, and decided that in no case could the conflict area enure to the junior claim, upon the expiration of the senior claim. In this respect the principle laid down by the Supreme Court of Idaho is clearly too broad as all the authorities seem to concede.

This is made more clear by a fourth rule recognized even by the courts which hold to the language of *Belk* v. *Meagher, supra*, as applying to conflicting locations. Thus it is held that if A duly locates claim X and thereafter while claim X is a subsisting claim, B duly locates claim Y with his discovery

point in a part of claim Y conflicting with claim X, and thereafter B makes a new discovery in his claim Y in a part not conflicting with claim X, then the claim Y, having been kept alive, becomes good throughout its whole extent (except as to land belonging either to an older claim or that has been patented) without any relocation or new location or amendment of location by locator B, as against those locating after such second discovery.

*Silver City M. Co.* v. *Lowry*, 19 Utah, 334, 57 Pac. Rep., 11.

*Bingham Amal. Co.* v. *Ute Co.*, 181 Fed. Rep., 748.

This particular modification of the doctrine of *Belk* v. *Meagher* is recognized even in *Gwillim* v. *Donellan*, 115 U. S., 45. If the above rule be admitted surely the inference claimed from *Belk* v. *Meagher* is cut up by the roots.

Having made now these preliminary observations on analogous rules we come to the exact question which is now before the court, and that is, what is the situation of a junior locator who keeps his claim alive upon the expiration of the senior claim, as to a conflict area of the two claims, even though the junior's discovery point is in the senior claim? This question may arise on two different issues. It may arise when the dispute is one of apex. Thus one man has a claim whose surface ground covers a particular ore body. But another man has a claim which contains the apex of that ore body, and the first man says that the claim of the second is invalid for the reason that when that claim was lo-

cated the ground containing the apex of the ore body in dispute was within the limits of an older claim then subsisting but which afterward passed away by being forfeited. We are not concerned with that situation except to say that all the authorities agree that in an apex suit, such as we have supposed, the claim containing the apex would be held entitled to the ore body regardless of the fact as to whether or not a relocation was made of the claim containing the apex after the older claim had become forfeited. The other issue with which we are concerned exists when it arises on the same facts in a protest suit, where the question is as to the right to a patent. It is fairly presumable that the rule applied on the first issue ought to be applied upon the second issue.

In considering this question it may help to its solution if we consider first what would be the situation if we eliminate the third location and suppose that A (Kettler) has located claim X (Emma No. 2) and thereafter while X (Emma No. 2) is a subsisting claim, B (Swanson) has located his claim Y (Independence No. 2) in such a way that Y conflicts as to surface with X and thereafter A allows claim X to the forfeited, and then B applies for a patent upon his claim Y, including the conflict area. Is it any reason for refusing B a patent to the whole surface of his claim that a part of his claim Y was once included within the limits of a senior subsisting claim? *Mining Co.* v. *Tunnel Co.*, 196 U. S., 337, answers this question by saying that B has his claim Y.

All the cases seem to conclude that as soon as the

X claim passes away the Y claim becomes a valid claim throughout its whole extent including the conflict area without any relocation by B of his Y claim or without any amendment to his location notice and without any remarking of his boundaries upon the ground.

This is fully shown in the case of *Lavagnino* v. *Uhlig, supra,* which still remains as an authority upon this point and an undisputed authority. We will examine that case a little later in this brief, since that case is decided from a consideration of the nature of the protest suit, but it no less results from the doctrine of the case of *Del Monte* v. *Last Chance, supra,* and from the case of *Mining Co.* v. *Tunnel Co., supra.*

As we have seen there is no objection to the junior locator placing the lines of his claim across a senior location and there is no objection to his locating his claim and marking his boundaries before he makes a discovery, provided that at the time he claims his right to accrue he has a discovery within the marked limits of his claim. If a relocation is not necessary in these two cases, it cannot be necessary when B is applying for a patent upon his Y claim and no one but the Government is contesting his right to a patent.

The cases upon this point are fully collected in Costigan Mining Law, 153, note 25; 160, note 51, and the case of *Mining Co.* v. *Tunnel Co.* decides the exact point.

When we now add the element that the discovery point of the Y claim is in the conflict area which con-

flict area afterwards ceases to exist before an application for patent has been made, the rule remains the same and must necessarily remain the same, namely, that the Y claim having a discovery within its limits at the time of the application for patent and the claim then being properly marked upon the ground, the three elements of location, marking upon the ground and discovery have united in the locator before he makes his application for patent, and, therefore, no relocation or new location or amendment of his prior location, in order to take in the area theretofore in conflict, is necessary.

This conclusion is shown by the following case: A has duly located the X claim. Thereafter, while the X claim is a subsisting claim, B locates the Y claim upon a discovery within the prior located ground of claim X but subsequently the prior locator of X draws in the line of his location, so that it leaves the discovery point of claim Y within the marked limits of claim Y.

Now if it be true as stated in the language of *Belk* v. *Meagher* that "a location to be effectual must be good at the time it is made," it follows that claim Y would not be a good location even when the conflict with a prior location had ceased to exist. Nevertheless the courts hold that claim Y, by the drawing in of the line of claim X becomes a valid location throughout its whole extent.

*Tonopah & S. L. M. Co.* v. *Tonopah M. Co.*,
125 Fed. Rep., 408.

We may also take the analogous situation hereinbefore noticed, of a case where A has located

claim X and thereafter while X is a subsisting location, B has located claim Y conflicting with claim X and having its discovery point within the limits of the area conflicting with claim X. It is conceded even by the Supreme Court of Utah that in this situation if Y makes a discovery in his claim outside of the conflict area his claim becomes good throughout its whole extent except as to some conflicting claim having a better right. *Silver City M. Co.* v. *Lowry, supra; Bingham Amal. Copper Co.* v. *Ute Copper Co., supra.* This particular principle is admitted in *Gwillim* v. *Donnellan, supra.*

In this latter case it is admitted that no relocation or amendment of the location notice is necessary when the new discovery is made, and none of the courts apply to this situation the language of *Belk* v. *Meagher* to the effect that a location to be effectual must be good at the time it was made.

Similarly, if A locates claim X and thereafter while X is a subsisting claim, B locates claim Y on a valid discovery outside of the conflict area. If later the senior location is abandoned, there is no question upon the authorities that claim Y immediately becomes a good and valid claim throughout its whole extent, as we have heretofore shown.

If, now, in the case last supposed, we substitute instead of the fact of abandonment the fact of forfeiture, the cases are precisely the same and why should they receive any different treatment. A forfeiture for failure to perform the assessment work is simply a conclusive statutory presumption that the locator has abandoned his claim. The two things cannot differ in spirit or in essence.

To sum up the discussion as far as it has gone it appears that if B locates a claim Y, which conflicts with an older subsisting claim and if the discovery of claim Y is in the older claim, yet if the older claim ceases to exist, the claim Y becomes at once a valid claim as against the United States, the proprietor of the land. If the claim is good against the United States, why is it not good against every other locator who gets his title from the United States? How is it that the third locator can get a better title than the United States can give him?

We may here notice another point, that the record in this case is not sufficient to support the decision of the Supreme Court of Montana for the reason that it does not appear from the record that the owner of the Independence No. 2 did not have another discovery within the limits of his claim outside of the bound of the conflict area after he located his claim and before the location of the Malta No. 1 was made. All the authorities agree that if such a discovery was made the whole surface of the Independence No. 2 becomes a good location for the plaintiff in error as soon as the senior location became forfeited without any act of relocation on the part of the plaintiff in error.

The Supreme Court of Idaho, however, in its opinion in this case disputes that point, for it expressly says (Rec., 172):

> "The contest arises between the third locator and the junior location covering a part of the same area. In determining this question it is unnecessary to determine the validity of the respective locations, except in so far as the same affects the ground in conflict."

The court therefore did not consider whether the junior location was a valid or invalid one, whether another discovery in the junior existed or was made outside the area in conflict with a senior location expired; if this fact was not before the court and not taken into consideration its decision is clearly wrong, for it is consistent with this record that there was such a discovery. If such a discovery existed it is agreed by the authorities that the conflict area enured to the junior location upon the expiration of the senior, but we prefer to put this case on the broader ground which we are arguing.

We come now to the case which we now have in hand, namely, where a senior location is existing and a locator properly locates and keeps alive a junior location conflicting with the senior for a part of its area and where the discovery point of the junior is within the limits of the area in conflict, and where the senior location thereafter becomes forfeited and after such forfeiture another party relocates the senior forfeited claim.

Is it not apparent in this case that the situation is precisely the same between the locator of the junior location after the senior location has failed to exist and the locator of the third claim, which is a relocation of the senior claim, as it is when between the locator of the junior claim and the Government? The third party making the relocation comes in under the Government and his title can not be any better than the Government's title; if the claim of the junior locator at the time of such location is good as against the Government, it must be good as against the third party relocating.

If no relocation is necessary upon a discovery being made where no discovery at all existed at the time of location, it follows that no relocation is necessary where by the extinction of the senior location the discovery point comes within the marked bounds of the claim located. At the very moment of the extinction of the senior claim the three things prescribed by the statute are found to concur in the locator of the junior location. He has a claim marked upon the ground, his location notice has been posted and a discovery of mineral within the limits of his marked boundaries has been made and all these acts must necessarily concur before the ground was relocated by any third party.

It is undoubtedly the law that the discovery of mineral within the claim need not be a discovery by the locator himself. He may adopt and use the discovery of some other person or of some preceding locator. Why may he not be considered as adopting his own discovery?

And why should a relocation be necessary? A new locator coming upon the ground has all the information that could be given to him in any case of a valid original location. He finds from the record of the junior claim how it is placed upon the ground; he finds what the location notice is and where it was posted and he finds within the limits of that claim that there was a discovery of mineral, and he can go to that point and test the discovery. Is it not putting a premium upon bad faith to say that such a person coming upon the ground can hunt around and find that once that ground was covered by an abandoned location, that the discovery point

of the present location which he finds was within the limits of such abandoned location, and thus defeat an apparently good location? It seems strange that such a technicality as this should ever have induced any court to hold that a locator coming upon land under these circumstances gets a better right.

To put the proposition in another way: As soon as the senior location becomes abandoned or forfeited the land becomes unoccupied land, except as to the junior location then subsisting, and it being, as to the junior location then subsisting, unoccupied mineral land of the United States at that moment the land is, so far as that junior location is concerned, unoccupied land of the United States. At that very moment, if the junior locator came upon the land, he would have a right to adopt the discovery upon the land, to mark out his claim and to post and file his location certificate and his rights would be paramount to those of all the world. But every one of those particular things he has already done. Why then is it necessary that he should do those useless things, because prior to that moment he may have staked his claim across the surface of some then abandoned claim? If the United States, the only adverse party at that moment concerned, waives the order of the acts done, why is any third party permitted to come in and set up a better right than the Government would have?

As we have already seen, where the discovery point of the junior location is not within the area in conflict between such junior location and the abandoned senior location, the law has always been that as soon as the senior location is abandoned or

forfeited, the conflicting area enures to the benefit of the junior location. It is the undoubted law that a junior locator can lay his lines across or upon a senior location provided his entry is peaceable and can thus get eveything the senior location does not take, and he can patent all the land he locates excluding the conflict area and if the senior location ceases to exist as a location, he at once becomes entitled to patent all the land within his claim including the conflict area, when he thereafter applies for a patent.

The Supreme Court of Utah in *Lockhart* v. *Farrell*, 56 Pac. Rep., 1077, admits that such is the law and no court would now question the fact and the Supreme Court of Utah in the last case cited says that the Supreme Court of the United States has so decided in the case of *Lavagnino* v. *Uhlig*, 198 U. S., 443, and attempts to confine that decision to the cases of a conflict area, which does not contain the discovery point of the junior location.

But what difference does it make, if upon the forfeiture or abandonment of the senior location, the junior location becomes entitled to all the land within the conflict area, whether or not that conflict area contains the discovery point of the junior location or not? As we have pointed out, as soon as that senior location ceases to exist, the junior location becomes entitled to the conflict area, and, as a matter of absolute law, the locator at that time could adopt anew the discovery which he has already made, and, as a matter of fact, there is no necessity for his discovery antedating his location. No evil

can possibly result in this latter case that would not result in the former.

Why should the claim owner go through the thoroughly useless form of going upon the ground to his discovery point which had once been within the conflict area with a senior location, when the senior location ceased to exist, and say, "I hereby come upon the ground and I again adopt this discovery point as the discovery point of my present location." If this is not the law compelling a thoroughly useless and vain thing, it is impossible to conceive of anything being useless and vain under the mining statute. But it is said that to adopt such a rule may lead to fraud. But let us see if that is the case. A senior locator is about to let his claim expire, and he knows that a junior locator has located a portion of his claim, and has been diligently at work keeping his claim alive. He says to some third party on January 1st you relocate my claim in our interest and we can fall upon the junior locator who thinks that he has a good claim. And how much worse is the situation when the senior locator himself relocates the claim he has just forfeited?

The correct conclusion upon this question was arrived at by this court in the case of *Lavagnino* v. *Uhlig* upon a different train of reasoning but a train of reasoning which is no less conclusive.

In that case, which was a protest suit upon the right to a patent; the X claim ("Levi P.") was located prior to 1889 and the assessment work thereon was performed up to and including the year

1896. While the X claim ("Levi P.") was subsisting, no forfeiture having occurred, B located the Y claim ("Uhlig") on January 1, 1889, conflicting with the X claim. Afterwards at the end of the year 1897, the X claim ("Levi P.") became forfeited on account of failure to do assessment work for the year 1897. Thereupon C relocated claim X as claim Z ("Yes You Do") on January 1, 1898.

A reference to the record in *Lavagnino* v. *Uhlig* will show (as stated in counsel's brief at page 448 of 198 U. S.) that the discovery point of the Y claim ("Uhlig") was in the area conflicting with the senior X claim ("Levi P.").

This is the precise situation which the court now has before it except that in *Lavagnino* v. *Uhlig* the locator of the Z claim was not the same person as the owner of the X claim who allowed it to become forfeited.

The court fairly meets the question with precision of statement and *shows that the sole question involved is whether B, the locator of the Y claim, must relocate when the X claim ceases to exist.* It will be observed that the court approaches the question solely from the standpoint of the protest suit and shows that from a consideration of the terms of that suit, it is impossible that the relocator, the owner of the Z claim, could set up the fact that at one time a portion of the Y claim had been included within the limits of a prior location. Because as the court points out if the X claim, the oldest claim had been kept alive and the owner of the Y claim had applied for a patent, nevertheless if the owner

of the X claim did not adverse the owner of the Y claim, the owner of the Y claim would take his whole claim for patent and this is so regardless of the third location which as a relocation has no privity with the first location. How then could the situation be any different, the court concludes, when the owner of the X claim allowed his claim to be forfeited.

In its reasoning the Supreme Court treated the consideration as wholly immaterial that the discovery point of the Uhlig claim was within the limits of the senior location, the Levi P. For the court must have reasoned that if upon the abandonment or forfeiture of the Levi P., the conflict area at once inured to the benefit of the junior location, the Uhlig, it was wholly immaterial whether that conflict area contained the discovery point of the Uhlig; and, therefore, the Yes You Do claim, located after the Uhlig had become a valid and subsisting claim as to the conflict area, could not set up the point that prior to the time when the Uhlig became a valid and subsisting claim, its discovery point had been included within the limits of the Levi P. If this is not so, there would have been no sense whatever in the court examing the question, because if it had been simply a question of conflict area and not a question of the discovery point being within the conflict area, all the authorities agreed, and every mining man agreed, that as soon as the Levi P. became abandoned, the conflict area between the Levi P. and the Uhlig belonged at once to the Uhlig. Such was the clear law in Utah, whence came the *Lavagnino* v. *Uhlig* case.

It appears that the Levi P. became forfeited at the last moment in the year 1897, midnight of December 31, 1897, and the Yes You Do claim was located January 1, 1898, and the situation, therefore, is precisely the same as the situation shown in our present case, except as to the personality of the relocator. It may be noticed that this fact existing both in the present case and in that case arises from the well known custom of locators going out upon the ground before midnight on the last day in the year in order to be ready to locate at the earliest possible time in the following year.

The court said in considering the case (italics are ours):

> "And, moreover, in considering the question which we propose to examine we concede, for the sake of argument, that the Levi P. location, of which the Yes You Do purported to be a relocation, was prior in date to the location of the Uhlig Nos. 1 and 2, and that there were areas in conflict between them. With all these concessions in mind, the question yet remains whether Smith and his transferee, in virtue of the location of the Yes You Do, stood in such a relation as to enable them, or either of them, to successfully adverse the application for patent made by the owners and possessors of the Uhlig location.
>
> It is undoubted that this court in a number of cases has declared that the rights of a senior locator of land are paramount to those of the owner of a junior location, so far as said junior location conflicts in whole or part with the prior location. * * * *It is elementary, also, that the power conferred by section 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title to the owner of the prior and forfeited*

*location*. The statute merely provides that when a forfeiture has been occasioned, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of same had ever been made. * * *

The question then is, where there was a conflict of boundaries between a senior and junior location and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?"

It will be seen, therefore, that the court simply considers this question with regard to adverse proceedings under the statute. He is not considering the case from the standpoint of an action of ejectment between locators of rival claims, where both have no patent, or in an apex suit where one has a patent and the other has not a patent, but as we have shown the same rule should there apply.

Then the court proceeds to consider the question just as if upon the abandonment or forfeiture of the senior location, the Levi P., the land covered by that location became unoccupied land, except as to the Uhlig.

The court said:

"To say that the relocator has such right (namely: to contest the right of an antecedent junior locator) involves, necessarily, deciding that as to the area in conflict between the junior and senior locations, the junior could acquire no present or eventual right whatever, and that on the abandonment or forfeiture of the senior claim, the area in conflict became without qualification a part of the public domain. In other

words, the proposition has come to this: That as the junior locator had acquired no right whatever, present or possible, by his prior location as to the conflict area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto, a new right accompanied with a performance of those acts which the statute renders necessary to mark a location of a mining claim.

The deductions just stated are essential to sustain the right of the relocator of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and old senior location for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two would be operative on the area in conflict on the forfeiture of the senior location. If it had that effect, it necessarily was prior and paramount to the right acquired by a relocator of the forfeited claim.

But we do not think that the deductions which we have said are essential to sustain the right of the relocator to adverse, under the circumstances stated, could be sustained consistently with the legislation of Congress in regard to mining claims."

The court then examined the adverse suit and showed the effect of that suit by saying:

"If there be a senior locator possessed of paramount rights in mineral lands for which a patent is sought, he may waive such rights and cause them in effect, to inure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse."

The court then showed that if the senior locator did not adverse, an undisputed presumption would have arisen that no conflicting claims existed as to the premises described in the location notice, or, if he had adversed, had failed to prosecute the adverse claims.

And the court said:

> "And this result, from the failure of the owner of a subsisting senior location to adverse * * *, or his waiver, * * * must, as the greater includes the lesser, also arise upon the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete."

The court then decided that at the time the Yes You Do claim was made as a relocation, the land was not unoccupied land of the United States. It will thus be seen that the principle upon which this case is decided is a principle which carries to the junior location, upon the forfeiture of the senior location, all the conflict area, and, to the question decided here, it is absolutely immaterial whether the discovery of a junior location was upon such forfeited senior location, or not, because as soon as the senior location was forfeited, the conflict area immediately enured to the benefit of the junior location, and, except for the junior location, the land would become unoccupied public land; but, since there was a junior location there, the land did not become unoccupied public land, but was transferred by operation of law to the junior location, and if the conflict area contained a discovery, that dis-

covery was transferred to the junior location, by its having theretofore been made by the junior locator which he still insists on as his discovery.

It would have been an idle and vain thing in our case for the locator of the Independence No. 2 as soon as the Emma claim became forfeited, to have filed a relocation, because his relocation would have simply specified the same land, the same discovery, the same marking upon the ground which his existing location then and there specified. Is it possible that the law requires him either to make a relocation or to go upon the land and, two feet away from his discovery, dig another discovery and put up a new set of stakes and write out a new location notice?

It would not be necessary for us to argue this case at all if it were not for the decision in *Farrell* v. *Lockhart,* 210 U. S., 142. In that case this court said as to *Lavagnino* v. *Uhlig,* at page 146:

> "In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining states or in territories of the United States where mining prevails—*Nash* v. *McNamara* (Nevada), 93 Pac. Rep., 405, and cases cited—which, in considering the reasoning of *Lavignino* v. *Uhlig,* also attributed to that reasoning, broadly construed, the serious and unfavorable consequences on rights of property suggested by the court below in its opinion. It may not be doubted, unless the reasoning in the Lavignino case is to be restricted or qualified, that the grounds upon which the court below rested its conclusions were erroneous. Not doubting at all the correctness of the decision in the Lavignino case, especially in view of the issue as to long pos-

session and the operation of the bar of the statute of the State of Utah, which was applied by the court below in that case, and whose judgment was affirmed, we do not pause to particularly re-examine the reasoning expressed in the opinion in *Lavignino* v. *Uhlig* as an original proposition. We say this, because whatever may be the inherent cogency of that reasoning, in view of the experience of the courts referred to concerning the practice which it was declared had prevailed, in reliance upon what was deemed to be the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice, and taking into view the prior decisions referred to, especially *Belk* v. *Meagher*, 104 U. S., 279, as also the more recent case of *Brown* v. *Gurney*, 201 U. S., 184, we think the opinion in the Lavignino case should be qualified so as to not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim."

In the case of *Farrell* v. *Lockhart*, the oldest claim was the South Mountain, located during the month of August, 1900. Therefore, all of the fractional year 1900 and all of the year 1901 was permitted in which to do the assessment work upon the South Mountain mining claim.

The second claim located was the Cliff, located on August 1, 1901, before the time for doing the assessment work upon the South Mountain had expired.

Thereafter Rhodin, the predecessor of Lockhart on January 2, 1903, located the Divide claim. No

assessment work was done upon the South Mountain, which became forfeited on the first day of January, 1902, after the Cliff claim had been located. The question in the case was whether the Cliff or the Divide was the better claim.

It will be noted that the limits of the Cliff claim were substantially the same as the limits of the older South Mountain claim, and it was therefore a relocation.

After the court had so far yielded as to say that it would not insist upon the doctrine of *Lavagnino* v. *Uhlig* as applicable to this case, it nevertheless found another ground upon which it could decide the case reaching the same result as if it had followed the case of *Lavagnino* v. *Uhlig*. It held that the evidence offered as to the South Mountain claim showed an abandonment of the South Mountain claim before the Cliff claim was located, and, therefore, the question of the location of the Cliff upon a claim that was not then forfeited became immaterial.

But this statement in *Farrell* v. *Lockhart* as to the doctrine of *Lavagnino* v. *Uhlig* is not a statement of the court upon a point necessary to be decided, because, if an abandonment had taken place before the location of the Cliff, the point decided in *Lavagnino* v. *Uhlig* could never have arisen in the case of *Farrell* v. *Lockhart* and while we do not mean to say that this *dictum* in *Farrell* v. *Lockhart* ought to be entirely disregarded by the court, nevertheless we do claim that if the court is satisfied that the decision in *Lavagnino* v. *Uhlig* was correct, it ought not to recede from its decision, especially as we can show that the evils to result are wholly fanciful.

We insist upon the point because it is admitted that if, upon the abandonment of the senior location, the junior locator makes a complete relocation of his claim, no one doubts that he acquires the conflict area.

Now without a relocation it would seem to be a fair conclusion to say that the failure of the owner of the X claim to do the annual labor on his claim amounts to an abandonment of the conflict area to the latter. An abandonment operates without any new affirmative act being required of the actual or intended beneficiary of the abandonment and the abandonment validates the junior claim as to all the abandoned ground in conflict with it. If the senior locator abandoned the conflict area to the junior locator, there is no question that the abandoned ground inured to the benefit of the junior locator.

But as we have pointed out, the case of *Belk* v. *Meagher*, which seems to have weighed with this court in *Farrell* v. *Lockhart*, was a decision in regard to an actual relocation pure and simple, not a decision in regard to the ordinary conflicts between two claims located upon different discoveries and different corners and markings and upon notices specifying different locations. The guarded language of *Farrell* v. *Lockhart* is (italics are ours):

> "The opinion in the Lavagnino case should be qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of *the same mining ground* upon the contention that at the time such prior location was made *the ground embraced therein* was covered by a valid and subsisting mining claim."

We believe that we are not in error in saying that this guarded language applies to a relocation pure and simple, a relocation which recognizes the existence of the older location and is an avowed attempt to appropriate a prior discoverer's work, discovery and claim. If this be true then there is no contradiction between *Belk* v. *Meagher, Lavagnino* v. *Uhlig* and *Farrell* v. *Lockhart*. *Belk* v. *Meagher* interdicts as void an actual relocation and appropriation of another existing claim and work. *Lavagnino* v. *Uhlig* and *Del Monte M. Co.* v. *Last Chance M. Co.* apply to locations upon different discoveries and different boundaries and different work, although they happen to conflict. And *Farrell* v. *Lockhart* simply guards *Lavagnino* v. *Uhlig* from being applied to the case of a relocation of the same claim and the appropriation of another's work, such as was in question in *Belk* v. *Meagher*. In this way all the cases are reconciled and may stand.

There is reason in this distinction which is taken. In the case of a relocation, pure and simple, which is an attempt to appropriate another's existing discovery, existing work and existing boundaries and markings, any entry by a relocator before the expiration of the former claim is necessarily a trespass, it cannot be peaceable in a legal sense, it is necessarily unlawful and wrongful, it ought not to be permitted, it ought to be interdicted. But in the case of mere overlapping claims, where the location of the junior claim is innocent and peaceable, lawful, praiseworthy and often necessary as pointed out in *Del Monte M. Co.* v. *Last Chance M. Co.*, the wholly different rule of *Lavagnino* v. *Uhlig* is properly and

laudably applied. The evils claimed in *Nash* v. *McNamara* referred to in *Farrell* v. *Lockhart* may result in cases of relocations pure and simple, but they cannot result from *Lavagnino* v. *Uhlig* any more than they can result from *Del Monte M. Co.* v. *Last Chance M. Co.*, or from the Land Office practice.

The trouble with the opinions of the Supreme Court of Idaho in this present case, of the Supreme Court of Nevada in *Nash* v. *McNamara*, 93 Pac. Rep., 405, of the Supreme Court of Utah in *Lockhart* v. *Farrell*, 86 Pac. Rep., 1081, is that they wholly ignore this plain distinction and do not recognize the effect of the Del Monte case or that of *Mining Co.* v. *Tunnel Co.*

The case of *Brown* v. *Gurney*, 201 U. S., 184, remains to be considered.

The facts in that case were that under an application to patent a lode claim, the Land Department refused to issue patent for the whole claim because two portions of the claim were separated by a patented placer and the Department, therefore, required the applicant to elect which tract he would patent. He elected to take and patent the north end of his claim. Three different people tried to locate the relinquished south end. The first prospector, Brown, located immediately after the Land Office had refused patent to the whole and had finally required the applicant to make an election. The second prospector, Gurney, located after the applicant had filed a written election to take the north end. The third prospector, Small, located immediately

after the subsequent final order of cancellation of entry for the south piece was entered in the Land Office. It was held that the refusal of a patent to the whole did not restore the south piece to the public domain, that the formal order of cancellation merely recorded a pre-existing fact, and that the first prospector to locate after the entryman abandoned the south end by electing to patent the north end had the better right. This is another case strictly of a relocation pure and simple and belongs under the category of *Belk* v. *Meagher* and is not in any way inconsistent with *Lavagnino* v. *Uhlig.*

There is another ground upon which that case may be distinguished, as pointed out by a very able article by Mr. George P. Costigan, Jr., entitled "The Doctrine of *Farrell* v. *Lockhart,*" in 11 Columbia Law Rev., 593, 723.

Mining land covered by an existing application for patent may well be deemed *sub judice* and as such incapable of being subjected even to inchoate rights of third parties until the land ceased to be subject to the *lis pendens,* and it may well be said to cease when the applicant elects to retain other ground under an order of the Land Department requiring the applicant to elect. *Brown* v. *Gurney* is, therefore, not inconsistent with *Lavagnino* v. *Uhlig* and its language ought to be read in connection with the facts in issue in the controversy being decided.

The objections made to the doctrine of *Lavagnino* v. *Uhlig* are found in *Nash* v. *McNamara,* 30 Nev., 114, 93 Pac. Rep., 405, and in the decision in

*Lockhart* v. *Farrell,* 31 Utah., 155, 86 Pac. Rep., 1081.

Those objections are summed up in the article referred to above, "Doctrine of *Farrell* v. *Lockhart,*" 11 Columbia Law Review, 733, where this whole subject is examined and the objections are shown to be without foundation, resulting mainly from misconception of what the law actually is.

The first objection made that to recognize potential rights in the conflict area as acquired by the maker of a junior conflicting location would be to encourage the making of many conflicting locations for speculative purposes, is fully answered by the language of this court in its decision in the *Del Monte M. Co.* v. *Last Chance M. Co.* case. The objection that it would bring into existence a class of professional relocators whose presence would cause undesirable altercations, if not bloodshed, on the public mineral domain, is answered not only by the Del Monte case, but by the consideration that the entry to initiate any rights must be peaceable. But both these objections apply to relocations pure and simple, as noticed in *Belk* v. *Meagher.*

The third objection that it involves the recognition of a series of potential claims, each entitled to priority if the senior claim and all prior claims ceased to be valid, is answered by the protest suit statute itself, which is made to cover exactly such cases, and by the consideration that such potential claims are actually valid under the Del Monte case, to determine apex rights.

The objection that it would encourage an evasion

of the annual labor requirement can be answered by the far greater evil of permitting the owner of the senior location to let his claim become forfeited for failure to do the annual assessment work and at the earliest moment relocate his forfeited claims, or tell some other person to do it, thus working a fraud upon the mining law, and a fraud upon some locator who thought he had a valid claim.

These objections are answered by the decision of the Land Department in *Mutual Mining Co.* v. *Currency Co.*, 27 Land Dec., 191, 193, where it was held that a protestant against a patent cannot be heard to charge that the Engineer discovery shaft, or the discovery of mineral on the Engineer location, was upon ground covered by a valid and subsisting prior location. They waived their right to be heard upon such a charge when they failed to file and prosecute an adverse claim. If the objection of no location was good at the time of application for patent, it was good until the patent actually issued.

As to the objection that the rule of *Lavagnino* v. *Uhlig* operates to the prejudice of an honest relocator, that objection has been fully answered by Mr. Costigan in the article entitled "The Doctrine of *Farrell* v. *Lockhart*," 11 Columbia Law Rev., 738, as follows:

> "Is the so-called 'honest relocator,'—the man who is waiting around for January 1 to come so that he may 'jump' some delinquent owner's claim,— is he being wronged by the doctrine of *Lavagnino* v. *Uhlig*? Before we waste too much sympathy on him, let us ask whether it is wholly desirable to have each year an exodus from each mining camp on December 31, or earlier, of those

virtuous citizens whose sole purpose in leaving is to rush up the mountains and canyons to grab locations which up till twelve P. M. of December 31 will continue to belong to their neighbors? Is the virtue of such persons much or at all superior to that of locators who are already on the ground and honestly maintaining locations which are valid, in part at least, or at any rate are actually believed by them to be so? The so-called honest relocator who tries to get the ground on January 1 is no more entitled to our sympathy than is the honest junior locator whom he seeks to oust on a technicality.

But, it may be said, think of the shock to the honest relocator if he finds himself postponed to the junior locator who had at the start a defective title! But that shock is surely no greater than he must have suffered when told, as he was, that a delinquent claim owner can defeat his benevolent intention of jumping the latter's claim by resuming work on it at any time prior to twelve P. M. of December 31, and the 'honest relocator' has somehow managed to survive that shock.

But, it is said, under *Lavagnino* v. *Uhlig*, the 'honest relocator' goes on the ground to grab what until he grabs it is his neighbor's—to reap where he has not sown—and finds that some one who did not wait until January 1 has grabbed it first—has left him only chaff—and this is intolerable! But does *Farrell* v. *Lockhart's* rule prevent that? No, for under *Farrell* v. *Lockhart*, if before January 1, the locator *abandons* his claim, the next moment the ground may be located and, if it is, then the 'honest relocator' who waited patiently till January 1 that the ground might become forfeited, finds that he is too late. The only question then is, what constitutes such an abandonment as *Farrell* v. *Lockhart* should recognize, and shall a senior locator who, with full knowledge of an honestly claimed

conflicting location, neglects to do the annual labor on his senior claim be allowed to deny, or shall a third person later, coming in with full knowledge of the junior claimant's good faith, prior possession and acts of location, be allowed to deny, that the senior claimant has abandoned his rights to the conflict area to the junior claimant who has fully acquired priority thereby? The second man's good faith, acts of location and priority in time—the real foundation of priority of title under American Mining Law—place him morally, and on principle legally, far above the third man, who, relying on a supposed technical flaw in the second man's title, seeks to grab from him that which the second man in good faith believed to be his. If the third man is to be given priority it is only because the court legalizes a moral theft.

But it may be suggested that the argument just advanced confuses abandonment with forfeiture. The two things are theoretically fundamentally different—abandonment is a matter of intention, taking effect instantly, while forfeiture is a matter of action, requiring an entry by a third person justified by a failure of the claim owner to perform the annual labor—and probably a confusion between the two should not be allowed. But abandonment may be evidenced by failure to do the annual labor, so there is necessarily a close connection between abandonment and forfeiture, and if a location may be made, as it may, by a discovery long after the performance of the acts of location, there is no reason why a relocation may not be made by acts of location prior to the forfeitableness of the claim relocated, if they are followed by that arrival of the time for relocation which makes the discovery on which the relocation is based available to validate the claim."

And as to the objection of evasion of the annual labor statute, we quote from the same article:

> "If *Lavagnino* v. *Uhlig* is to be followed and the restriction placed on it in *Farrell* v. *Lockhart* removed, it is suggested that the senior locator will so manipulate things as to relocate his claim, or have others do it secretly for him, and thus both evade the annual labor requirement and keep off the relocator who would really develop the claim. If this were true, it would be a very serious thing; but it is not true. *Lavagnino* v. *Uhlig* does not involve such consequences. It was a decision founded on the good faith of the junior locator, and can be justified only if so founded. No junior claimant who does not proceed in the best of good faith can claim under it. It is true that in Utah it has been held that a delinquent claim owner can relocate his own claim for his own failure to perform the annual labor, but that decision is unsound, being based on too literal an interpretation of the relocation statute, and, being contrary to the spirit and intent of the mining laws, would not be extended by any court. A relocation attempted by the owner prior to the expiration of the period for doing the anual labor, whether a relocation in his own name or in the name of his friends, if made to escape the annual labor requirement, could not stand on any higher footing than a relocation to escape the annual labor requirement made after an attempted abandonment; and such a relocation after attempted abandonment has been held to be invalid.
>
> The Supreme Court of the United States evidently believed that a decision of *Farrell* v. *Lockhart* in favor of the junior locator, if the junior location preceded an abandonment of the senior location, would have a bad effect on mining titles. But how could it? Two doctrines,—(1) that a location based on a discovery within the limits

> of an older and existing location cannot be validated without a complete reperformance of the acts of location, or, at least, without an amendment of the recorded location certificate, unless such junior location was made in ignorance that its sole discovery was on such older location and that such older location was still in existence; and (2) that both valid and invalid mining claims may be abandoned by those who initiate or maintain them,—remove any real danger. If *Farrell* v. *Lockhart* were to be reversed today, not a single previous location that had been made or maintained in bad faith would be made effective thereby, and no location that had been abandoned for any reason—even the reason that the opinion in *Farrell* v. *Lockhart* convinced the owners of a junior claim that, despite the abandonment of the senior claim containing the junior claims discovery point after the location in good faith of the junior claim, the subsequent third location had priority—would be restored to life. It would seem to be clear that no 'vested right' worthy of serious consideration would be endangered by a reversal of *Farrell* v. *Lockhart.*"

It remains for us to notice the further point, that in any event, as the findings in the lower court show, the relocation by Mrs. Kettler of her claim Emma No. 2 as the Malta No. 1, was invalid and a fraud upon the mining law.

The authorities upon this point are not numerous.

1 Lindley on Mines (2d Ed.), Sec. 405, Shamel on Mining Law, 128, 129, Morrison's Mining Rights by Morrison and De Soto (13th Ed.), 124, 125, hold that such a relocation is invalid.

Snyder on Mines, Sec. 584, 585, a Utah man, supports the Utah doctrine.

Costigan on Mining Law, 327, says:

> "That very effort shows that the locator is not in good faith in retaining his claim; for the right way to show good faith in that regard is to resume work and to prosecute the resumption work with vigor. Nothing, then, but the clearest kind of language in the statute should justify a court in deciding that a man may relocate his own claim, so as to defeat the real object of the mining laws. That position is further strengthened by the fact that the common law knows nothing of any right in a man to forfeit his own property in favor of himself."

The decided case of *Warnock* v. *DeWitt*, 11 Utah, 324, 40 Pac. Rep., 205, is not in point for that is a relocation made before the contesting location was made and could be treated as resumption of work. As to this case see Costigan on Mining Law, 328-330.

It is true that the findings in this case attempt to excuse the defendant in error for relocating by saying that she was away from Blaine County and did not return until the latter part of December, 1903 (Rec., 20), but this offers no reason why she did not resume work. If she could hire a relocator, she could hire a man to start work. By a relocation she need not do any work for 1903 or 1904 and had all of 1905 to do but once the assessment work to cover three years, while if she resumed work she would have to do $100.00 worth of labor for 1903, another $100.00 of labor for 1904 and another $100.00 of labor for 1905. The findings show that she voluntarily chose an illegal method, which could give her no rights.

In conclusion we may be pardoned for using the language of a wholly disinterested writer, Costigan Mining Law, 313, note 60:

> "It is to be hoped that the Supreme Court of the United States will reaffirm *Lavagnino* v. *Uhlig*, and thereby support the land department ruling that a location based on a discovery within an existing valid location is only voidable if attacked in time, and is far from being absolutely void" (citing the Land Office cases cited in this brief, *supra*).

Against the policy of that rule the Supreme Court of Idaho urges (Rec., 176):

> "If the contention made by appellant (plaintiff in error here) should be sustained, in our judgment it would subject to relocation every valid mining claim and make the relocation of mining claims purely a speculative business and lead to fraud and misrepresentation."

But is it not plain that this language applies to actual relocations pure and simple, to the wrongful appropriation of another's discovery boundaries, marking and work. It cannot apply to mere conflicting locations where both are in good faith and the conflict occurs from peaceable and innocent acts. If that is not so the evil has already been committed since *Del Monte M. Co.* v. *Last Chance M. Co.* permits that very thing to be done, and holds it to be proper and laudable. But how can the courts use such language, if they know that this very thing is being permitted as to conflicting locations every day by the Land Office, and none of the much heralded evil appears.

Since the rule we contend for is just and plain we pray that this judgment of the Supreme Court of Idaho may be reversed.

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*Attorney for Plaintiff in Error.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1911.

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## No. 217

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CHARLES SWANSON,
*Plaintiff in Error,*

*vs.*

JOHN T. SEARS and NANCY M. KETTLER,
*Defendants in Error.*

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## BRIEF OF DEFENDANTS IN ERROR.

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### DEFENDANTS' IN ERROR STATEMENT OF THE CASE.

(References in this brief to the Transcript of Record are to top pages, and are abbreviated to Rec. Defendants in Error were defendants below and will be referred to as defendants here.)

On May 21, 1881, defendant John T. Sears and S. M. Tucker duly located Emma No. 2 Mining claim (Rec. 17, par. 3). Assessment work to the amount of $100 or more was done on said claim by defendants and their predecessors in interest each and every year up to and including 1902 (Rec. 18).

The present Nancy M. Kettler was the wife of S. M. Tucker at the time of said location and derived her interest in said claim by deed from him. The Emma No. 2 Claim was laid out and located northerly and southerly. About 1883 or 1884 plaintiff's predecessors in interest located Independence claim in an easterly and westerly direction, so that the east end line of Independence was flush against the west side line of Emma No. 2 (Rec. 19). On January 3, 1889, Emma No. 2 was a valid and subsisting mining claim (Rec. 19). On said day plaintiff's predecessors undertook to locate an extension of Independence, by putting an east and west location over Emma No. 2, calling it Independence No. 2. Their discovery was on ground actually embraced within the confines of Emma No. 2; their location notice was actually posted thereon (Rec. 19).

The assessment work was done on the Emma No. 2 claim until 1903 when through sickness in her family and other adversities defendant was unable to do it, and undertook to continue her former right by a re-location. This branch of the case is best stated in the language of the findings of fact made by the State Courts (Rec. 20-22):

> 15. That during the year 1903, defendant, Nancy M. Kettler, was called to Seattle on account of the illness of her daughter, who was compelled to undergo an operation there, and was not able to return to Blaine County until the latter part of December; that by reason of her being absent during this period no annual assessment was done on said Emma No. 2 mining claim; but at that time or any and all times,

it was not her intention to abandon or forfeit said claim, but her intention was to do such things as she deemed proper and which she was able to do to hold said claim.

16. That defendant, Nancy [illegible] Kettler, believed the only way she could hold the ground embraced in the old Emma No. 2 mining claim, after failing to do the assessment work for the year 1903, was to have the same re-located.

17. That acting on said belief, and with the express intention of preserving and maintaining her rights in and to the ground covered by Emma No. 2 location, she did on the 31st day of December, 1903, procure A. J. Sullivan to act for her in this behalf, and did go with him on said date, in company with William Sullivan, an adult son of A. J. Sullivan, to the house and home of plaintiff Swanson and wife, in the immediate vicinity of Emma No. 2, for the purpose of having the said Emma No. 2 relocated for her on the following day; that for many years prior to said date plaintiff and his family were close friends of defendant and her family, and on said date, and at all times in these findings mentioned, prior to the year 1906, defendant placed implicit confidence in and reliance upon plaintiff.

18. That on said 31st day of December, 1903, plaintiff met defendant and her said companions, A. J. Sullivan and Wliliam Sullivan, at his said home and before they had reached plaintiff's said house inquired of her what brought her there at such a time; defendant then informed him that she had come to protect the Emma claims and that she was going to have them re-located, whereupon he assured her that this was unnecessary, for he, plaintiff,

would not let anyone jump her claims.

19. That during the evening of December 31st, 1903, plaintiff discussed with defendant and A. J. Sullivan the question of re-location of the Emma claims, but during said discussion, nor at any time prior to 1906, did plaintiff, either directly or indirectly inform her, either of said Sullivans or any one acting for her—behalf, that he, plaintiff, claimed any portion of the ground included in said Emma No. 2 claim.

20. That in pursuance to the discussion as to the lines and re-location of the Emmas between plaintiff and defendant, Nancy M. Kettler, and A. J. and William Sullivan, said Swanson went with the said Sullivans to show them the corners and lines of said Emma No. 2.

21. That during the morning of January —, 1904, plaintiff's wife in the presence of plaintiff suggested to defendant, Nancy M. Kettler, that the names of said claims be changed from Emma to Malta, assigning as a reason therefor that it would be lucky, and defendant adopted the suggestion.

22. That plaintiff on the morning of January 1st, 1904, dictated the notice of location of Malta No. 1 (and all the other three Maltas as well) and that A. J. Sullivan reduced said notice to writing as dictated, which said notice was thereafter on said day duly posted by William Sullivan assisted by plaintiff.

23. That plaintiff went with the said Sullivans to the N. W., S. E. and S. W. corners of said Emma No. 2 and pointed out to them stakes that were then standing in the ground and informed them that they were the said corner stakes, respectively, of said Emma No. 2,

whereupon said stakes were adopted as said corner stakes of said Malta No. 1, being at the time in the presence of the plaintiff properly re-marked as such, said stakes being very near and approximately in the same place as the corresponding official stakes of said Malta No. 1, as shown on plaintiff's exhibit B.

24. That on the day said Malta No. 1 was located there were no monuments or stakes of the Independence No. 2 on said land and there was nothing to show that anyone had re-located any part of the lands embraced in the old Emma No. 2 claims.

25. That at no time mentioned in these findings, or at all, has plaintiff or his predecessors in interest had possession of any portion of the surface ground of Emma No. 2 (Malta No. 1) nor performed any assessment work on any portion of the surface thereof, nor in any tunnel or shaft which starts on any portion of the surface thereof; nor has he nor have they done or caused anything to be done on or from any portion of the surface thereof which would tend to indicate a claim on their part to any portion of said claim.

26. That the only assessment work ever done on the purported Independence No. 2 was through tunnels on the Independence claim.

27. That plaintiff's concealment from defendant of his claim to a portion of the Emma No. 2 ground and his assistance in the re-location thereof, deceived the defendant and induced her to believe that at that time, January 1, 1904, the plaintiff laid no claim to any portion of said Emma No. 2 (now Malta No. 1), and also induced her to expend considerable sums of money thereon, thereafter.

28. That at the time of the re-location of the Emma No. 2 as Malta No. 1 plaintiff was fully apprized of whatever claim he had to any portion of the ground covered by the location of said Emma No. 2 and knew the lines and corners of the Emma No. 2 and also the lines and corners of the purported location of the Independence No. 2, but did not disclose his claim to a portion of the said Emma No. 2 ground, nor advise defendant, or any one acting for her, concerning the purported location of Independence No. 2, because he desired to deceive her with reference to these matters.

The trial court found the facts in favor of defendant. The Supreme Court refused to disturb them. As conclusions of law the trial court concluded defendant was entitled to patent to Malta No. 1, including the area in conflict with Independence No. 2, without specifying on what particular ground, and entered decree accordingly. Upon appeal to the Supreme Court of Idaho this decree was affirmed but the opinion announced: "If we are correct in our conclusion that the appellant acquired no interest or title or right of possession to the ground in conflict, by reason of the Independence No. 2 location, and that the respondent acquired title and right of possession by virtue of Malta No. 1, then the question of estoppel becomes of no consequence in this case. It is a matter of entire indifference and wholly immaterial whether the appellant is estopped to deny the respondent's title to the ground in conflict by reason of his acts and conduct in pointing out to the respondent the lines of the Emma claim and siding, without objection, to

the location of Malta No. 1 and without making claim to any part of the ground covered by such location. For this reason it is entirely unnecessary to discuss or consider the question of estoppel, as whatever view this court might take of this question could make no difference as to the result finally to be reached." (Rec. 177-178.)

Upon petition for rehearing on the question of estoppel, filed by respondent (defendant in error here) that court refused to recede from its silence on this question (Rec. 190-191).

The first question to be disposed of by this court is: Did plaintiff become possessed of title (inchoate) to the area in conflict in 1904 by virtue of his location of said ground in 1889, which was already located by defendant, and a valid and subsisting mining claim at that time, because defendant failed to do assessment work in 1903, and undertook to re-locate her own claim? If this court agrees with the Idaho Courts on this question the case necessarily ends in an affirmance of their judgment. Should it disagree with them then the question of estoppel should be decided by this court, and a correct judgment be entered in consideration of the whole case.

Sec. 708 R. S. pages 467-468 Fed. Stat. Ann. Vol. 4.

## ARGUMENT AND AUTHORITIES.

When plaintiff posted his notice and made his discovery for Independence No. 2, January 3, 1889,

on ground that was then embraced within a valid and subsisting mining claim, belonging to and in possession of another, the attempted location was absolutely void, not merely voidable. It conferred no rights, either present or prospective. It was void not only as against the owner of the claim upon which such attempted location was made, but as against the whole world.

*Belk* v. *Meagher*, 104 U. S. 279; 26 L. Ed. 735.

1 Lindley on Mines, Sec. 363-337 (Ed. 1897).

1 Morrison Min., Rep. 510.

Barringer & A., Mines & Min. p. 306.

1 Snyder on Mines, Sec. 572.

Martin's Min. Law & L. O. Proc., Secs. 197-282.

Costigan on Mining Law, 151.

*Gwillim* v. *Donnellan*, 115 U. S. 45; 29 L. Ed. 348.

*Del Monte M. & M. Co.* v. *L. C. M. & M. Co.*, 171 U. S. 55.

*Clipper M. Co.* v. *Eli M. Co.*, 194 U. S. 226; 48 L. Ed. 944.

*Brown* v. *Gurney*, 201 U. S. 182; 50 L. Ed. 717.

*Farrell* v *Lockhart*, 210 U. S. 140; 52 L. Ed. 994.

*Book* v. *Justice M. Co.*, 58 Fed. 128.

*Oscamp* v. *Crystal R. M. Co.* 58 Fed. 293-5.

*Perigo* v. *Erwin*, 85 Fed. 904.

*McCullough* v. *Murphy*, 125 Fed. 153-4.
*Zerres* v. *Vanina*, 134 Fed. 614.
*Malone* v. *Jackson*, 137 Fed. 878.
*Rose* v. *R. M. Co.*, 27 Pac. 1110.
*Johnson* v. *Young*, 34 Pac. 173.
*Jordan* v. *Duke*, 53 Pac. 197.
*Conn* v. *Oberto*, 76 Pac. 369.
*Shattuck* v. *Costello*, 68 Pac. 529.
*Peoria & C. M. & M. Co.* v. *Turner*, 79 Pac. 915.
*Anderson* v. *Caughey*, 84 Pac. 223.
*Sharp* v. *Sullivan*, 80 Pac. 1050.
*Lockhart* v. *Farrell*, 86 Pac. 1077.
*Nash* v. *McNamara*, 93 Pac. 405.
*Moorhead* v. *Erie M. Co.*, 96 Pac. 253.
*Lozar* v. *Neill*, 96 Pac. 343.
*Garthe* v. *Hart*, 73 Cal. 541.
*Souter* v. *McGuire*, 78 Cal. 545.
*Quigley* v. *Gillette*, 101 Cal. 469.
*Wilson* v. *Freeman*, 68 L. R. A. 836 Note.
*Montague* v. *Labay*, 2 Alaska 575.

The above authorities seem to hold the attempted location would be void (as to overlapping portion) even though the location notice and discovery were not posted and made on any portion of a valid and subsisting claim, but merely included a portion thereof.

The following authorities deal with cases where the discovery was made within a valid and subsisting mining claim, and hold any attempted location based on such discovery to be absolutely void.

1 *Lindley on Mines*, Secs. 337-339.
*Martin's Min. Law, etc.*, Sec. 282.
*Barringer & Adams M. & M.*, pp. 216-222.
*Morrison's Min. Rights*, 36.
*Costigan on Mining Law*, 152.
27 Cyc, 557.
*Gwillim* v. *Donnellan*, 29 L. Ed. 348.
*Erwin* v. *Perigo*, 93 Fed. 608.
*Crown P. M. Co.* v. *Buck*, 97 Fed. 465.
*Watson* v. *Mayberry*, 49 Pac. 479 (Ut).
*Reynolds* v. *Pascoe*, 66 Pac. 1064 (Ut).
*Sharp* v. *Sullivan*, 80 Pac. 1054 (Colo).
*S. B. M. & R. Co.* v. *Winchell*, 83 Pac. 628 (Colo).
*Anderson* v. *Caughey*, 84 Pac. 223 (Cal).
*Hoban* v. *Boyer*, 85 Pac. 837 (Colo).
*Lockhart* v. *Farrell*, 86 Pac. 1077.
*Tuolumne C. M. Co.* v. *Maier*, 134 Cal. 585; 66 Pac. 863.
*Russell* v. *Dufresne*, 1 Alaska 486.
*Atkins* v. *Hendree*, 1 Idaho 95.

Abandonment by senior locator of area conflicting with junior locator will inure to benefit of the latter.

1 Lindley on Mines, Sec. 363-396.
*Belt* v. *Meager*, 104 U. S. 279-285.
*Oscamp* v. *C. R. M. Co.*, 58 Fed. 293.
*Pralus* v. *P. G. & S. M. Co.*, 35 Cal. 35.

So far as we know the first dissent, or seeming dissent, from this position was evidenced by this court in Lavagnino v. Uhlig, 49 Law. Ed. U. S.

1119, but the original position, in conformity with Belk v. Meagher, supra, was taken in Brown v. Gurney and Farrell v. Lockhart, supra, so that as the law now stands, as well upon decided cases as natural justice and sound principle, plaintiff's attempted location of Independence No. 2 was a void act—void because the discovery was made in and the location notice posted on a valid and subsisting mining claim.

## THE LAWS OF IDAHO.

While a locator of mining claims derives his authority thereunder and his title from the United States yet in establishing his rights he is required to conform to the laws of the State or territory in which his claim is located. Section 3210 Idaho Revised Code provides:

> "If at any time the locator of any mining claim, heretofore or hereafter located, shall be desirous of taking any part of an overlapping claim which has been abandoned, he may file an additional certificate, provided, that such amended location does not interfere with the existing rights of others at the time when such amendment is made."

A party cannot make a valid re-location of lands legally possessed by another until the owner's rights have been abandoned, forfeited or otherwise ended.

*Lockhart v. Rollins*, 2 Idaho 540.

After the senior's location has been forfeited

the junior should file an amended certificate if he wishes to take in part of an abandoned claim.

*Morrison v. Regan*, 8 Idaho 291.
*Moorhead v. E. M. & M. Co.*, 96 Pac. 253.

A junior locator may, subsequent to the abandonment or forfeiture of the conflict area by the senior, amend his location and include the overlapping surface; but without some act on his part manifesting an intention to make a new appropriation or acquire a new right after the abandonment or forfeiture became effectual, this area would not by mere gravity become a part of the junior location.

1 *Lindley on Mines*, Secs. 363-396, 1st Ed.
*Morrison's Mining Rights*, 102.
*Johnson* v. *Young*, 18 Colo. 625.
*Oscamp* v. *C. R. M. Co.*, 58 Fed. 293.

But defendants further contend that plaintiff would not be entitled to secure the area in conflict by an amended location even if there had been an abandonment or forfeiture of the Emma No. 2 claim, for the reason that said section 3210 only applies to imperfect location, and not to void locations. If the *discovery* of a junior location is on a valid subsisting claim, or if, for any reason, the senior location was wholly void, an amended certificate would not be sufficient to cure the imperfection or to take in the area in conflict, but a relocation would have to be made.

*Sullivan* v. *Sharp*, 80 Pac. 1054.
*Brown* v. *Gurney*, 50 L. Ed. 718.

## ESTOPPEL.

It is a well established rule of equity which has been adopted by the courts of law that where A has, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induced B to believe certain facts to exist and B has rightfully acted upon this belief, so that he will be prejudiced if A is permitted to deny the existence of such facts, A is conclusively estopped to interpose a denial thereof.

11 *Am. & Eng. Enc. Law*, 421-428.
*Clark* v. *Kirby*, 55 Pac. 373.
2 *Herm. Estop.* Secs. 937-939.
*Biglow on Estop*, 493.
*Dickerson v. Colgrove*, 100 U. S. 578.
*Dolbur* v. *Livingston*, 100 Cal. 617.
*Carpy* v. *Dowdell*, 115 Cal. 677.
*Swain* v. *Seamens*, 76 U. S. 254.
*Trenton B. Co.* v. *Duncan*, 86 N. Y. 228.
*Morgan* v. *C. & A. M. R. Co.*, 96 U. S. 716.
*Eastwood* v. *Standard M. Co.*, 11 Ida. 195.

If a man knowingly, by declarations or acts or by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal right against such persons.

*Kirk* v. *Hamilton*, 102 U. S. 68.
3 Washburn on Real Prop. 82.
*Snodgrass* v. *Ricketts*, 13 Cal. 360.
*Bryan* v. *Ramirez*, 8 Cal. 462.

*Brewster* v. *Baker*, 16 Barb. 618.
*Hicks* v. *Cram*, 17 Vt. 449.
11 *Am. & Eng. Enc. Law*, 429.

The principle of estoppel applies to mining claims and adverse suits.

*Bunker Hill M. Co.* v. *Pascoe*, 66 Pac. 574.
*Reynolds* v. *Pascoe*, 66 Pac. 1064.

It is held that one was estopped from disputing that land was subject to homestead entry when he had disclaimed any interest therein and led one to believe it belonged to the United States.

*Moore* v. *Brownfield*, 39 Pac. 113.

The same rules of law relating to estoppel *in pais* apply to mining ground as to any other real estate; and by remaining silent, while another enters upon the land and makes improvements, the original claimant waives his right to the possession of the claims.

*Kelly* v. *Taylor*, 23 Cal. 11.
*Real D. M. Co.* v. *Pond M. Co.*, 23 Cal. 82.
*MacGarrity* v. *Byington*, 12 Cal. 426.

The party who has placed his written title on record has given the notice which every person is bound to know and respect. The law does not require him to go further. But if he speaks or acts, it must be consistent with his recorded title.

*Knouff* v. *Thompson*, 16 Pa. St. 364.

One is not permitted to deny a state of things which by culpable silence or misrepresentation he

has led another to believe existed, and who has acted accordingly upon that belief.

*Morgan* v. *Chicago & A. M. R. Co.*, 24 L. Ed. 745.

A false representation or concealment of material facts, or a design to mislead, is not necessary to constitute an equitable estoppel by an act which was voluntary and calculated to mislead, and actually has mislead another acting in good faith.

*Town* v. *Smith*, 7 L. R. A. 755.

If the declaration or conduct were intended to deceive generally, or occurred under circumstances likely to deceive, it is sufficient.

*Horn* v. *Cole*, 51 N. H. 297.

The intention with which the declaration is made is not material. It is the fact that the declaration has been acted upon by others, that constitutes the liability to them.

*Mitchell* v. *Read*, 9 Cal. 205.

If a person maintains silence when in conscience he ought to speak, equity will estop him from speaking when conscience requires him to be silent.

*Clark* v. *Kirby*, 55 Pac. 373.
*Bigelow on Estoppel*, 493.
11 Amer. and Eng. Ency. 428.

We respectfully submit that the facts found by the State Courts and elsewhere quoted herein show a complete estoppel against plaintiff; that having found the *facts* the decision of the Supreme Court

of Idaho should have been made to rest, at least in part, upon the law applicable thereto, and that this Court should now apply the law of estoppel if found necessary in order to sustain the judgment of the Supreme Court of Idaho upon the broad principle that a correct judgment on the facts will not be reversed because arrived at by incorrect reasoning. Nevertheless we think the Federal question has been correctly decided and that the judgment can and should be affirmed on that ground.

Respectfully Submitted,

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